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CONVEYANCER'S NOTEBOOK

ERRATA

We regret that there were some misprints in Messrs. Blundell and Wellings's article in our last issue. The following corrections should be noted:

Pages 278 (line 8) and 279 (line 2), for "section 24 (3) (a)" read "section 25 (3) (a)."

Page 279 (line 19), for "earlier" read "later."

PERIOD OF NOTICE TO COMPLETE PURCHASE

It is comparatively rare for contracts for the sale of land to provide that the time for completion shall be of the essence. Although the normal twenty-eight days between contract and completion usually proves sufficient, few solicitors would like to bind their clients absolutely to the day. On the other hand, vendors often have purchases dependent on their sales and are not anxious to be kept hanging about unduly. Under an open contract, the position is far from satisfactory, for the vendor's solicitor has to make two estimates: first, he must try to assess what lapse of time will, in the view of the court, amount to unreasonable delay, for he cannot serve his notice until then. Secondly, he must serve a notice giving the purchaser reasonable time within which to complete. Few practitioners would feel confident in their ability to make this double forecast.

Hence the practice has grown up of providing in the general conditions that the vendor can serve a notice of a specified length, after which time the guillotine falls. Such a condition is to be found in the Statutory Forms of Conditions of Sale, 1925, which provides that the vendor may give to the purchaser or his solicitor

" at least twenty-one days' notice in writing specifying the breach and requiring the purchaser to make good the default before the expiration of the notice." The object of the condition is plain, to introduce certainty in place of uncertainty, so that, when the client anxiously asks how much longer he must wait, his solicitor can reply: " The day after the contract date I will serve him with a notice to complete within —— days and, if he does not, you may forfeit the deposit and sell to someone else." Both sides are usually content with this arrangement; the purchaser expects to complete within twenty-eight days, and if he is to get, say, twenty-one days' grace, he is satisfied that that would be a reasonable limit.

But, as the decision in *Re Barr's Contract* [1956] 1 W.L.R. 918 (noted *post*, p. 403) makes plain, this is not the way the Chancery Court views the matter. The robust words of a common law judge, that " you may make time of the essence by giving an appropriate notice during the progress of the negotiations towards completion " (*Phillips* v. *Lamdin* [1949] 2 K.B. 33, 42), may appeal to business men but can hardly be said to represent the law. A series of recent decisions, *Pedigree Stock Farm Developments* v. *R. Wheeler & Co., Ltd.* (1950) 155 E.G. 66, *Smith* v. *Hamilton* [1951] Ch. 174, and *Re Engall's Agreement* [1953] 1 W.L.R. 977, have shown that the standard conditions do not give the certainty that practitioners have sought. It was, no doubt, in view of these decisions that, when the Law Society's Conditions of Sale and the National Conditions of Sale were revised in 1953, the relevant provisions (condition 36 of the former, 23 of the latter) received special attention, the respective draftsmen feeling that at last they had achieved their object. The first difficulty of deciding when the notice may be served appears to have been got over: under both the Law Society's and the National Conditions, it may be served as soon as the completion date is passed, but the second difficulty still remains. The period specified in the notice cannot be less than that specified in the conditions, but how much more (if any) does not depend on the will of the vendor but on what the court thinks is reasonable in all the circumstances. (It would seem that the Law Society's condition is in this respect subject to the same objection as the National condition: see Dr. E. O. Walford's discussion of this condition in Vol. 17, at p. 343, and G. Boughen Graham's " Stipulations as to Time," Vol. 18, p. 452.)

It is doubtful whether practitioners will be content to leave the matter where it is. They do not want their clients to buy litigation: all they want is a rule of thumb and either the standard conditions will have to be revised again or the formula in *Harold*

Wood Brick Co., Ltd. v. *Ferris* [1935] 2 K.B. 198 ("but in any event not later than ——") used.

Completion "On or Before"

It is quite a common practice to provide for completion to take place "on or before" a certain date, and we wonder whether there is any clear idea in the minds of practitioners who use this formula precisely what is meant and what the effect is. We rather suspect that it is intended to indicate that the date given is to be the date for completion subject to a pious hope that the purchase may be completed at an earlier date. The words "or before" can hardly bind either party to complete prior to the date specified, and there is certainly nothing to prevent a vendor and purchaser completing before a contractual date for completion, whether the words "or before" are in the contract or not. It seems, however, that the formula may have a result which is not really intended by the parties, for it can be seriously argued that its use makes time of the essence of the contract.

In *James Macara, Ltd.* v. *Barclay* [1945] K.B. 148 Mr. Devlin, as he then was, argued that the use of these words made time of the essence. du Parcq L.J. referred to *Patrick* v. *Milner* (1877) 2 C.P.D. 342, where it was held that time was not of the essence where the same words were used. In the result, *James Macara, Ltd.* v. *Barclay* was decided on another ground, but in *Patrick* v. *Milner* Grove J. said, at p. 348, after referring to the words "on or before": "I incline to think that if the condition stopped there, fair ground would have existed for contending that the parties must be taken to have intended that time should be of the essence of the contract . . . but the subsequent words put a different complexion on the case, 'but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchasers are . . . .'" That was a case of a sale of a reversion where the court is more ready to infer that time is of the essence of the contract than in other cases.

Whatever may be the true construction of the words in question we do suggest that it is not a very happy phrase, for it seems difficult to escape from the conclusion that in the absence of something else in the contract to indicate that a later date is envisaged the ordinary rule, *inclusio unius exclusio alterius*, should apply.

Goody *v.* Baring—The Views of the Council of the Law Society

We referred, *ante*, p. 180, to the decision of Danckwerts J. in *Goody* v. *Baring* [1956] 1 W.L.R. 448, where the learned judge

stated that it seemed to him practically impossible for a solicitor to do his duty to both clients where he acts for both vendor and purchaser. We are glad to see from the *Law Society's Gazette* for August, at p. 374, that the Council reaffirmed that there is nothing inherently improper in a solicitor acting for both vendor and purchaser, and that the judgment in *Goody* v. *Baring* does not call for a reversal of what has been the long established practice of solicitors in appropriate cases. The Council point out that the judgment underlines the principle that once a conflict of interest arises, or seems likely to arise, the solicitor should at once determine his retainer for one party if not both, which is precisely the view which we took.

The other interesting question that arose in *Goody* v. *Baring* was with regard to the purchaser's solicitor's duty to make inquiries about the rent of rent restricted property, and the Council of the Law Society took the opinion of leading counsel in the matter. Counsel advised that whether a purchaser's solicitor may properly confine his inquiries as to recoverable rents to those made of the vendor's solicitor depends on the circumstances. If the answers are clear and convincing the purchaser's solicitor is entitled to accept them and will not be liable in negligence if they prove to be inaccurate. If, on the contrary, they are evasive or inconclusive, he should make further inquiries, one source of which would be the tenants themselves, and counsel advised that it would be an undesirable practice to make inquiries of the tenants before contract without the consent of the vendor. The position after the contract is different; the purchaser's solicitor is then entitled to make inquiries from the tenants as to the recoverable rents without his asking the vendor's consent. Indeed, there is hardly a point on which the law and practice are more settled than the rule in *Hunt* v. *Luck* [1902] 1 Ch. 428, that a purchaser has notice of the rights of all persons in occupation.

If we may say so, with respect, we entirely agree with the views of counsel, though what does not seem at all clear is the obligation on a solicitor to make preliminary inquiries. Theoretically, he is retained to investigate the vendor's title, although the scale fee includes work in connection with the contract, but the subject of the preliminary inquiries is of comparatively modern growth. It is quite clear that if the solicitor in fact makes the inquiries and searches he is under an obligation to communicate the results, so far as there is anything to communicate, to his clients: *Lake* v. *Bushby* [1949] 2 All E.R. 964. It is probably true that in nearly every case the purchaser's solicitor makes inquiries, but the extent varies considerably from case to case. Quite often, finding that

there is doubt on a particular point, he will mention it to his client, who will decide whether he is worried about the point or not. Probably, today, in the absence of contrary instructions, a solicitor must make the inquiries which are usually made, but one cannot help wondering whether the courts know what these are.

Land Registry Fees on Registration of Charges

Under the Land Registration Fee Order, 1930, as it stood until the Land Registration Fee Order, 1950, on first registration where a charge was lodged at the same time no fee was payable (Abatement of Fees, para. 1). Where the title was already registered and a charge was lodged at the same time as a transfer, one-half of the fee normally payable on registration of a charge (which is the same as that on a transfer) was chargeable (para. 2). Under the 1950 Order no fee was payable under paragraph 2, but a full fee became payable on registration of notice of the making of further advances under a charge to secure further advances which was registered with a transfer for value.

By the Land Registration Fee Order, 1956, the 1950 Order has been revoked. The result is that under paragraph 2 half fees become payable again, but the full fee on registration of notice of the making of further advances mentioned above is reduced to half. It will be noticed, however, that there is still no fee payable on charges lodged on first registration.

The Order came into force on August 1 last.

The Administration of Justice Act, 1956

The Administration of Justice Act, 1956, contains a number of miscellaneous provisions of interest to conveyancers.

Grants of Representation. By section 17 (1) there is a general provision that a grant of representation may be called in and revoked if it ought not to have been granted or contains an error.

By section 17 (3) the provisions with regard to the resealing of Northern Irish grants are amended. Under section 169 of the Judicature Act, 1925, resealing only applied to grants in respect of personalty. It is now provided that the section applies and is deemed always to have applied to all the estate of the deceased person. Section 169 also provided that there had to be lodged on application for resealing a certificate that a bond had been given in Northern Ireland covering the English as well as the Northern Irish estate, but, no doubt in error, the requirement was not limited to grants of administration. It now is.

Trustee Powers of Attorney. Trustee powers of attorney by the Trustee Act, 1925, s. 25, had to be filed at the Central Office within ten days of execution. By section 18 of the new Act, this time limit is abolished and they can be filed at any time.

Execution of Judgments. By section 34, writs of elegit are abolished and the Law of Property Act, 1925, s. 195 (1), (2), (3) and (5), which provides that Supreme Court judgments operate as charges on the land of the judgment debtors is revoked. By section 35, the High Court or a county court may impose on any land of a debtor a charge for securing any moneys due or to become due under a judgment or order against the debtor. The order operates as an equitable charge created by the debtor and is registrable as a writ or order affecting land.

By section 36, the power to appoint a receiver by way of equitable execution is extended to all legal estates and interests in land. Where an order made under section 35 has been registered under the Land Charges Act, 1925, the appointment of a receiver by the court either in proceedings to enforce the charge or under section 36 does not need to be registered as well.

Qualification of Land Registrars. By section 53, solicitors as well as barristers are now eligible for appointment as Land Registrars.

Commencement. All the above provisions, except sections 34 and 35, have been brought into force on July 16 by the Administration of Justice (Commencement) Order, 1956.

REPAIRS TO TRUST PROPERTY

By John Willcock, B.C.L., M.A., Barrister-at-Law *

Few aspects of the legislation relating to trusts have caused more headaches than the " welter of confused and confusing enactment " (to quote Vaisey J.) concerning repairs to trust property. No apology is made, therefore, for this attempt to restate what are conceived to be the basic rules of law on the subject.

Two questions have to be considered: —

(*a*) Is there any duty to repair, and, if so, on whom does it rest?

(*b*) How should the costs of any repairs (whether done in performance of a duty or not) be borne as between capital and income?

It is proposed to consider these questions, first, in relation to property held upon trust for sale and, secondly, in relation to property held in strict settlement under the Settled Land Act, 1925. It will be assumed in each case that the trust instrument contains no provisions relating to repairs and that the beneficiaries are not all ascertained and of full age (or that, if they are, they have not come to any agreement on the subject).

I. PROPERTY HELD UPON TRUST FOR SALE

(a) The duty to repair. Where property is held upon trust for sale, the legal estate is vested in the trustees and they have exclusive control over its management. They are also under a duty to keep it in repair (*Re Hotchkys* (1886) 32 Ch.D. 408, 416–7; *Re Howlett* [1949] Ch. 767, 775; [1949] 2 All E.R. 490, 493). They may, however, delegate their powers of management to the life tenant (Law of Property Act, 1925, s. 29), and, if they do, their duty to repair will, it is thought, devolve upon him. In this case, however, they should, as a precaution, obtain from the life tenant an express undertaking to keep the property in repair as a condition of the delegation (*Re Wythes* [1893] 2 Ch. 369; *Re Bagot* [1894] 1 Ch. 177). Apart from any such delegation, the life tenant will not normally be under any duty to repair at all.

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* It is with deep regret that we have to inform our readers that Mr. John Willcock has been reported missing, presumably killed, while climbing in the Jungfrau area of Switzerland on August 14 or 15.

(b) How should the costs of repairs be borne as between capital and income? The "welter of confused and confusing enactment" is by no means easy to disentangle, but it is submitted that the following rules may be deduced (it is assumed, for the sake of simplicity, that the trustees keep the property in repair themselves):—

(1) Where the repairs are repairs to houses or other buildings or erections, the trustees may pay for them out of income (Law of Property Act, 1925, s. 28; Settled Land Act, 1925, s. 102).

(2) Where the repairs are improvements authorised by the Settled Land Act, 1925, the trustees may pay for them out of capital (Law of Property Act, 1925, s. 28 (1); Settled Land Act, 1925, ss. 73 (1) (iii) (iv), 84 (1)). As to the position where the Trustees raise the money by means of an improvement rentcharge, see *Re Sandbach* [1951] Ch. 791; [1951] 1 All E.R. 971.

(3) Where the repairs come within both the above rules, the trustees may pay for them out of either income or capital, or partly out of one and partly out of the other, as they think fit (*Re Conquest* [1929] 2 Ch. 353).

(4) Where the repairs come within neither rule (1) nor rule (2), it is doubtful whether the trustees have power to allocate the costs of them to either income or capital. If any such case should arise, therefore, they should apply to the court for directions as to how the costs of the repairs should be borne (*Re Hotchkys* (1886) 32 Ch.D. 408).

(5) Where the repairs come within rule (1) but not rule (2), the trustees may pay for them out of capital if, but only if, they obtain the authority of the court so to do (*Re Hotchkys, supra*; *Re Smith* [1930] 1 Ch. 88).

These rules will now be considered in greater detail.

Rule (1): *Repairs to houses or other buildings or erections*

The trustees' power to pay for such repairs out of income is derived from section 28 of the Law of Property Act, 1925, which, amongst other things, gives them the powers of management conferred on trustees of a settlement under the Settled Land Act, 1925, during a minority by section 102 of that Act. These powers include power "to erect, pull down, rebuild, and repair houses, and other buildings and erections," and are exercisable by trustees for sale whether there is a minority or not (*Re Gray* [1927] 1 Ch. 242). They cover most of the repairs needed in practice, subject to a few exceptions such as repairs to footpaths, drives, etc.

Rule (2): *Improvements authorised by the Settled Land Act*, 1925

These are the works specified in the Third Schedule to the Settled Land Act, 1925, and the works specified in the Third Schedule to the Agricultural Holdings Act, 1948 (Settled Land Act, 1925, ss. 73 (1) (iii) (iv), 83; Agricultural Holdings Act, 1948, ss. 81 (1), 96 (1)). The catalogue of these works is long. Generally speaking, those specified in the Third Schedule to the Settled Land Act, 1925, are improvements in the strict sense. Nevertheless, many of them also involve an element of repair. If a roof leaks, the best way of repairing it may be to replace it with a new one—an operation which may be both a work of repair and an improvement (*Re Gaskell's Settled Estates* [1894] 1 Ch. 485). This is illustrated by the following examples of improvements specified in the Third Schedule to the Settled Land Act, 1925, each of which generally involves some element of repair:—

Pt. I, para. (xxi): Reconstruction, enlargement, or improvement of any of the works (such as "cottages for labourers, farm-servants, and artisans," drains, sewers, etc.) specified in paras. (i)–(xx).

Pt. I, para. (xxiii): Additions to or alterations in buildings reasonably necessary or proper to enable the same to be let (this includes any additions or alterations, whether structural or not: *Re Lindsay's Settlement* (*No.* 2) [1941] Ch. 119; [1941] 1 All E.R. 143, and applies even to buildings which are already let if the tenant threatens to leave unless the additions or alterations are carried out: *Re Calverley's Settled Estates* [1904] 1 Ch. 150).

Pt. II, para. (iv): Restoration or reconstruction of buildings damaged or destroyed by dry-rot.

Pt. II, para. (v): Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let.

On turning to the Third Schedule to the Agricultural Holdings Act, 1948, on the other hand, we find that in the case of agricultural property virtually any kind of repair work is classified as an improvement, the costs of which may be paid for out of capital. This remarkable result is brought about by para. 23 of the Schedule, which classifies as improvements "Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding other than repairs which the tenant is under an obligation to carry out," and by section 94 (1) of the Act, which defines "fixed equipment" as including "any building or structure affixed to land and any works on, in, over or under land."

It has been held that para. 23 of the Third Schedule to the Agricultural Holdings Act, 1948, applies whether the property is let or not (*Re Duke of Northumberland* [1951] Ch. 202; [1950] 2 All E.R. 1181). It has also been held that where the property is let, the words " other than repairs which the tenant is under an obligation to carry out " are to be disregarded for the purpose of determining how the costs of repairs should be borne as between capital and income (*Re Lord Brougham and Vaux's Settled Estates* [1954] Ch. 24; [1953] 2 All E.R. 655; but *cf. Re Sutherland Settlement Trusts* [1953] Ch. 792, 804; [1953] 2 All E.R. 27, 31). The only stipulation is that the repairs must have been begun on or after March 1, 1948 (*Re Sutherland Settlement Trusts, supra*—with regard to works begun before that date, reference must be made to Pts. I and II of the First Schedule to the Agricultural Holdings Act, 1923). Thus in the case of agricultural property it seems that virtually any kind of repair work whatsoever may be paid for out of capital, including even repairs which an agricultural tenant of the trustees is under an obligation to carry out himself—although morally it would seem that the trustees ought to make such a tenant fulfil his obligation.

The power of the trustees to apply capital money in payment of the cost of repairs which are improvements authorised by the Settled Land Act, 1925, is subject to two qualifications. In the first place, such payment may only be made on a certificate furnished by a competent engineer or able practical surveyor, employed independently of the tenant for life, certifying that the work or operation comprised in the improvement, or some specific part thereof, has been properly executed, and what amount is properly payable in respect thereof—or, failing this, an order of the court (Settled Land Act, 1925, s. 84 (2)). In the second place, unless the improvement is one of those authorised by either Pt. I of the Third Schedule to the Settled Land Act, 1925, the Third Schedule to the Agricultural Holdings Act, 1948, or the trust instrument, the trustees may, if they think fit, and must, if so directed by the court or if the improvement is one of those authorised by Pt. III of the Third Schedule to the Settled Land Act, 1925, recoup the capital money so expended by them out of income by not more than fifty half-yearly instalments (Settled Land Act, 1925, s. 84 (2); *cf.* Agricultural Holdings Act, 1948, s. 81 (1)).

Rule (3): *Repairs within both rule* (1) *and rule* (2)

The trustees may pay for repairs which come within both rule (1) and rule (2) out of either income or capital, or partly out of one and partly out of the other, as they think fit (*Re Conquest* [1929]

2 Ch. 353). In this case the trustees have a discretion and their decision will therefore always depend on the particular facts before them. It is, however, pertinent to consider the principles on which they ought to exercise their discretion. Unfortunately these have never been satisfactorily defined, and when in the recent case of *Re Boston's Will Trusts* ([1956] 2 W.L.R. 700; [1956] 1 All E.R. 593) the court was invited to remedy the deficiency, the invitation was not taken up. The learned judge, Vaisey J., contented himself with a declaration in general terms that the trustees of the will there in question "notwithstanding para. 23 of the Third Schedule to the Agricultural Holdings Act, 1948, [the estate comprised agricultural property] have a duty to preserve the capital value of the testator's residuary estate in exercising the discretionary powers conferred on them by the joint effect of section 28 of the Law of Property Act, 1925, section 73 (1) (iv) of the Settled Land Act, 1925, and section 96 (1) of the Agricultural Holdings Act, 1948, and ought not to lay out capital moneys in any manner authorised by the joint effect of those sections without regard to such duty."

In the course of his judgment the judge also observed: "I cannot myself see that it would be wrong for trustees to take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties interested in the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property. I do not think that it should be a matter of mere arithmetic with no reference to the personal elements in the situation, which indeed it may be very difficult for a trustee to disregard, even if he tried to do so."

Personal considerations apart, it is thought that, in general, ordinary current or "casual" repairs should be paid for out of income, and only repairs in the nature of permanent improvements to the trust property should be paid for out of capital (*Re Smith* [1930] 1 Ch. 88). In deciding what is a permanent improvement the trustees should take into account the state of repair of the property when it first came into their hands, since "a repair which in the ordinary way might not constitute a permanent improvement may be treated as such if, on the one hand, it is permanent, and, on the other, it substantially improves the state of the property as compared with what it was" when it first came into the trustees' hands (*Re Smith*, *supra*, at p. 101). It is submitted that the trustees should also take into account the age of the life tenant, since if his age is such that the value of the repair is likely to be exhausted in his lifetime, it seems

unreasonable to throw the whole cost of the work on to capital even if it might in the ordinary way constitute a permanent improvement.

If the trustees feel any doubt as to the manner in which they should exercise their discretion, they may apply to the court for directions (*Re Robins* [1928] Ch. 721; *Re Smith, supra*). It would appear from *Re Boston*, however, that if they wish to obtain any positive assistance from the application, they would be well advised to surrender their discretion to the court and to place on the court the onus of deciding how the costs of specific items of repair should be borne.

If, on the other hand, the trustees prefer to decide the matter themselves, without recourse to the court, the court will not normally interfere with their decision (*Re Robins, supra*).

Rules (4) *and* (5): *Repairs within neither rule* (1) *nor rule* (2), *and repairs within rule* (1) *but not rule* (2) *which the trustees wish to pay for out of capital*

Where the repairs come within neither rule (1) nor rule (2), it is doubtful whether the trustees have power to allocate the costs of the repairs to either income or capital, and their only safe course is to apply to the court for directions. So also where the repairs come within rule (1) but not rule (2), but the trustees nevertheless wish to pay for them wholly or partly out of capital, they should apply to the court for authority so to do. The court has always had an inherent jurisdiction to deal with applications of this kind in so far as they affect property held upon trust for sale (*Re Hotchkys* (1886) 32 Ch.D. 408). This jurisdiction has remained unimpaired by the 1925 legislation (*Re Robins* [1928] Ch. 721; *Re Whitaker* [1929] 1 Ch. 662; *Re Smith* [1930] 1 Ch. 88), although it would seem that the court now has a concurrent statutory jurisdiction to the like effect under section 57 of the Trustee Act, 1925.

II. PROPERTY HELD IN STRICT SETTLEMENT UNDER THE SETTLED LAND ACT, 1925 (*i.e.*, SETTLED LAND)

(a) The duty to repair. Where property is held in strict settlement under the Settled Land Act, 1925, the legal estate is vested in the life tenant and he has exclusive control over its management. But, although in relation to his statutory powers he is deemed to be in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement (Settled Land Act,

1925, s. 107, replacing Settled Land Act, 1882, s. 53), he is not, in general, under any duty to keep the trust property in repair, unless the trust instrument expressly requires him so to do (*Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404; *Re Cartwright* (1889) 41 Ch.D. 532; *Re Courtier* (1886) 34 Ch.D. 136; *Re Parry and Hopkin* [1900] 1 Ch. 160; *cf. Re Field* [1925] Ch. 636). The only exceptions to this rule are certain types of repair work which he may be required to undertake by statute (*e.g.*, the Public Health Acts, 1936 and 1937, and the Housing Acts, 1936 to 1952, and see also Settled Land Act, 1925, s. 88), and, in the case of leasehold property, repairs which he may be required to do under the covenants in the lease.

In any case in which the life tenant is under a duty to repair it would seem that, morally, the trustees should take reasonable steps to ensure that he performs that duty. They may compel such performance, if necessary, by proceedings under section 93 of the Settled Land Act, 1925. They will not, however, incur any legal liability if they fail to take such proceedings, or even if they do nothing at all (Settled Land Act, 1925, ss. 96, 97). They are not in any case thought to be under any duty to repair the trust property themselves, their chief function being merely to receive and hold any capital money arising under the settlement.

(b) How should the costs of repairs be borne as between capital and income? Assuming that the life tenant does keep the property in repair it is submitted that the costs of the repairs should be borne as between capital and income in accordance with the following rules:—

(1) The life tenant may pay for any repairs whatsoever out of income (or, for that matter, any other resources he may have).

(2) Where the repairs are improvements authorised by the Settled Land Act, 1925, he may direct the trustees to pay for them out of capital (Settled Land Act, 1925, ss. 73 (1) (iii) (iv), 75, 84).

(3) Where the repairs are not improvements authorised by the Settled Land Act, 1925, the trustees may pay for them out of capital if, but only if, they obtain the authority of the court so to do (*Re De Teissier* [1893] 1 Ch. 153).

These rules will now be considered in greater detail.

Rule (1): *Any repairs*

It is self-evident that the life tenant may pay for any repairs out of income if he chooses, since this is his own money which he may spend as he pleases.

Rule (2): *Improvements authorised by the Settled Land Act*, 1925

These are the works specified in the Third Schedule to the Settled Land Act, 1925, and the works specified in the Third Schedule to the Agricultural Holdings Act, 1948 (Settled Land Act, 1925, ss. 73 (1) (iii) (iv), 83; Agricultural Holdings Act, 1948, ss. 81 (1), 96 (1)). The scope of these works, and the qualifications to which the power of applying capital money in payment of them is subject, are the same as in the case of property held upon trust for sale (see para. I (b), rule (2), *supra*). The only point to notice is that in the case of property held in strict settlement, unlike that of property held upon trust for sale, it is the life tenant who decides whether improvements which can be paid for out of income shall in fact be paid for out of capital. Consequently, if the life tenant directs the trustees to pay for certain repairs out of capital on the ground that they are improvements authorised by the Act, the trustees have no option but to comply with his direction, provided only (i) that they are satisfied that the repairs are in fact improvements authorised by the Act, (ii) that they obtain the requisite engineer's or surveyor's certificate in accordance with section 84 (2) of the Act, and (iii) that they give effect to the provisos to section 84 (2) concerning recoupment out of income, where these are applicable (Settled Land Act, 1925, ss. 73, 75, 84). It may seem undesirable that in the case of agricultural property the life tenant should be able to benefit himself at the expense of the remaindermen by directing the trustees to pay for merely casual repairs out of capital, but it has been held that he can, having regard to the extended definition of "improvements" in the Third Schedule to the Agricultural Holdings Act, 1948 (*Re Duke of Northumberland* [1951] Ch. 202; [1950] 2 All E.R. 1181; *Re Boston's Will Trusts* [1956] 2 W.L.R. 700; [1956] 1 All E.R. 593. *Cf. Re Sutherland Settlement Trusts* [1953] Ch. 792; [1953] 2 All E.R. 27; *Re Wynn* [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865).

Rule (3): *Repairs not falling within rule* (2) *but which the life tenant wishes to be paid for out of capital*

In the case of property held in strict settlement, unlike that of property held upon trust for sale, the court has no inherent jurisdiction to authorise the application of capital money in payment of the costs of repairs except for the purpose of salvage (*Re De Teissier* [1893] 1 Ch. 153). It has now, however, ample statutory jurisdiction for this purpose under section 64 of the Settled Land Act, 1925, as amended by section 2 of the Settled Land and Trustee Acts (Courts' General Powers) Act, 1943. See also the 1943 Act, s. 1, as

amended and made permanent by Emergency Laws (Miscellaneous Provisions) Act, 1953, s. 9, and *Re Scarisbrick's Re-Settlement Estates* ([1944] Ch. 229; [1944] 1 All E.R. 404), where it was held that the 1943 Act, s. 1, did not—as it might appear to do—restrict the jurisdiction of the court under the Settled Land Act, 1925, s. 64.

Provisions in the trust instrument relating to repairs. It has been assumed so far that the trust instrument contains no provisions relating to repairs. If it does, the trustees or the life tenant (as the case may be) may, of course, give effect to them. No provision in the trust instrument can, however, negative the powers conferred on the trustees or the life tenant (as the case may be) by statute, *i.e.*, the powers referred to in rules (1) and (2) of para. I (b), *supra*, and rule (2) of para. II (b), *supra*, respectively. Hence these powers are always available even where the trust instrument contains express provisions relating to repairs. Thus if the trust instrument directs all repairs to property held upon trust for sale to be paid for out of income, the trustees may nevertheless —if the repairs are improvements authorised by the Settled Land Act, 1925—pay for them out of capital if they think fit (*Re Wynn* [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865).

Agreement between the beneficiaries. It has also been assumed so far that the beneficiaries concerned are not all ascertained and of full age (or that, if they are, they have not come to any agreement on the subject of repairs). If, on the other hand, the beneficiaries concerned are all ascertained and of full age and do agree as to how the costs of any repairs should be borne as between capital and income, the trustees may safely give effect to their agreement and will in all normal cases do so.

Tax reliefs. Finally it should be observed that expenditure on repairs to trust property may enable the life tenant to obtain relief either under the Income Tax Act, 1952, s. 101, against his Schedule A assessment, or, in the case of agricultural property, under section 313 or 314 against any Schedule D assessment he may incur in respect either of his profits as a farmer or of "excess rents." Where the cost of the repairs is borne by income, it seems only reasonable that the life tenant should be entitled to keep the benefit of these reliefs for himself. Where, on the other hand, the cost of the repairs is borne by capital, it has been argued that the benefit of the reliefs should accrue to capital as well. This argument has now been rejected by the Court of Appeal in *Re Pelly's Will Trusts* ([1956]

3 W.L.R. 26; [1956] 2 All E.R. 326 (reversing the decision of Wynn-Parry J. reported [1956] Ch. 81; [1955] 3 All E.R. 483), where it was held that the life tenant was entitled to keep the benefit of the above-mentioned reliefs for himself notwithstanding that the repairs giving rise to them were paid for out of capital. The decision in *Re Pelly* was confined to the case of a strict settlement where the tenant for life pays for the repairs in the first place and is recouped out of capital by the trustees subsequently, but there seems no logical reason why the same principle should not apply to a trust for sale, or to a strict settlement where the repairs are paid for in the first place by the trustees. (See also *Re Fulford* [1930] 1 Ch. 71; *Re Kleinwort's Settlement Trusts* [1951] Ch. 860; [1951] 2 All E.R. 328; neither of which appears to have been cited in *Re Pelly*.) This point was left open in *Re Pelly*, however, and cannot therefore be regarded as settled.

SEWERS AND DRAINS AND THE PRIVATE LANDOWNER

By J. F. Garner, ll.m., Solicitor

In a former article in this *Journal* (*a*), we endeavoured to explain the difference between a public and a private sewer, and also that between a sewer and a drain, and then outlined a few of the reasons why these distinctions are of importance to the private landowner. We are now returning to the subject and propose to offer a few more detailed observations on the respective rights and duties of landowners and the local authority in this difficult branch of law. We have already quoted elsewhere the strictures of Wills J. (*b*) on this branch of our legislation; as the years pass these remarks made now sixty years ago, acquire renewed force and veracity.

(A) The Rights of Landowners

It is perhaps somewhat refreshing to find in a branch of "public land law," that the landowner has any "rights" at all, but in the case of public sewers, he has a right to cause his drains or sewer to communicate with a public sewer and thereby to discharge foul and surface water. The substantive right, which applies to all types of "premises" (*c*), is given by section 34 of the Public Health Act, 1936 (*d*), and, as might have been expected, it is subject to a number of provisoes and exceptions, which may be summarised as follows:

(i) If the premises to be drained are situate outside the district of the local authority into whose public sewer it is desired to drain (*e*), the right to connect up may still be exercised, but the authority may then impose reasonable terms and conditions (including the making of a reasonable payment or payments), before (*f*) such right may be exercised (*g*).

(ii) Special rules apply in the case of the emission of "trade effluents" (see below).

(*a*) 16 Conv.(n.s.) 189.
(*b*) In *Bradford* v. *Eastbourne Corporation* [1896] 2 Q.B. 205, cited on the title page of the author's *Law of Sewers and Drains*.
(*c*) An expression widely defined in the Public Health Act, 1936, s. 343 (1).
(*d*) Hereinafter referred to as "the P.H.A., 1936."
(*e*) Even if that public sewer is itself outside the local authority's district.
(*f*) *East Barnet Valley U. D. C.* v. *Stallard* [1909] 2 Ch. 555.
(*g*) P.H.A., 1936, s. 35.

(iii) If separate public sewers are provided for foul water and surface water, foul water may not be discharged into a surface water sewer and (except with consent) *vice versa*.

(iv) Although a storm-water overflow sewer may technically be a public sewer, no connections may be made thereto without the consent of the local authority.

(v) The passing of certain matters into any public sewer (including petroleum spirit) is totally prohibited (*h*).

(vi) The right given by section 34 does not override private rights. In particular, therefore, a landowner cannot run his drain or sewer through the land of a neighbouring owner without first obtaining his consent (*i*).

(vii) The rights given by section 34 do, however, enable the landowner to break up the surface of a street for the purpose of making the connection with a public sewer, subject to due compliance with the procedural provisions of the Public Utilities Street Works Act, 1950 (*j*).

(viii) Before exercising his rights under section 34, the landowner must give written notice to the local authority (*k*) of his proposal to make the communication with the public sewer, and the local authority may prohibit the making of the communication, "if it appears to them that the mode of construction or condition of the drain or sewer is such that the making of the communication would be prejudicial to their sewerage system"; any case of dispute under this provision may be referred to the local magistrates (*l*).

(ix) Further, the local authority may prohibit the landowner from making the communication himself, electing to do the work themselves. Most local authorities, in practice, exercise this power (*m*) in all cases as a matter of routine, their expenses being recoverable from the landowner.

(x) The right may be exercised in respect only of a public sewer, and *not* in particular, in respect of a highway drain vested in the highway authority as such.

(xi) It should also be noted that the landowner cannot be

(*h*) *Ibid.*, s. 27; the list of prohibited substances may have been extended in some districts by local Acts.

(*i*) The local authority have no wider powers if they act for the landowner in this respect as the compulsory powers of the P.H.A., 1936, s. 15, apply only to the construction of a public sewer: see *Wood* v. *Ealing Tenants* [1907] 2 K.B. 390.

(*j*) In the case of a private street, it may be necessary to serve notices on the "managers," *i.e.*, all the other frontagers.

(*k*) In addition to any notice required under the building by-laws.

(*l*) P.H.A., 1936, s. 34 (3).

(*m*) Given by the P.H.A., 1936, s. 36.

compelled to exercise his "right." If existing premises are drained to a cesspool, the local authority cannot insist on drainage to a convenient public sewer, even if this has been newly constructed for the purpose of abolishing cesspools in the district (*n*), unless they can show that satisfactory provision has not been made for the drainage of the premises (*o*) or unless they are prepared to bear the whole cost of altering the drainage system themselves (*p*). In the case of new premises, drainage to a public sewer may be insisted upon, but only if satisfactory provision is not otherwise made, and only then if the sewer is within 100 feet of the site of the building, the sewer is at a suitable level, and the intervening land is land through which the owner is entitled to construct a drain (*q*).

Trade Effluent. Under section 2 of the Public Health (Drainage of Trade Premises) Act, 1937, the occupier of *any* premises may not discharge (directly or indirectly) into a public sewer any trade effluent without first serving a "trade effluent notice" on the local authority, unless the particular case falls within one or other of the special exemptions provided for in the 1937 Act (*r*). "Trade effluent" may be discharged from any type of trade premises, and is widely defined in section 14 of the 1937 Act (*s*). On receipt of a trade effluent notice, the local authority may consent to the discharge of the effluent, either unconditionally or (as is more common in practice) subject to conditions as to one or more of the matters (in particular, stipulating for payments) specified in the notice, or they may refuse consent outright. If consent is refused or conditions are imposed, the occupier (*t*) of the premises may appeal to the Minister of Housing and Local Government (*u*).

(*n*) Unless some special power contained in a local Act has been exercised.

(*o*) Under the P.H.A., 1936, s. 39.

(*p*) See *ibid.*, s. 42.

(*q*) This control is exercised through the local authority's building by-laws: see the P.H.A., 1936, s. 37.

(*r*) These exemptions may be summarised as follows (see the 1937 Act, s. 4):

(i) where the authority's trade effluent by-laws permit the particular discharge—very few authorities have any such by-laws;

(ii) where a discharge of an effluent of a similar kind and rate of flow, etc., was being made at some time during the period from March 3, 1936, to March 3, 1937; *or*

(iii) where the discharge is made pursuant to an agreement with the local authority made prior to July 1, 1938.

(*s*) "Any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises, and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises, but does not include domestic sewage," or (by s. 4 (4)), laundry effluents.

(*t*) It will be noted that liability under the 1937 Act is placed on the occupier, not the owner.

(*u*) 1937 Act, s. 3.

(B) The Duties of Landowners

As well as the rights given by section 34, the P.H.A., 1936 imposes a number of duties or liabilities on landowners in relation to public sewers vested in the local authority, and private sewers and drains vested in the landowner himself. Thus:

(i) The landowner may be liable for the costs of maintaining (*v*) certain lengths of public sewer, under section 24 of the Act. This section applies to two types of lengths:

(a) lengths in respect of which some person other than the local authority was responsible for maintenance immediately prior to the coming into operation of the P.H.A., 1936, on October 1, 1937 (*w*), and

(b) lengths vested in the local authority immediately prior to October 1, 1937, but not constructed by them or at their expense, and being situate in a garden, court, yard or passage used as a means of access to the premises served by that length of sewer, the means of access not being a highway repairable by the inhabitants at large (*x*).

Where the section does apply, the local authority may, after service of the appropriate notices (or, in a case where they consider "immediate action" is necessary without serving such notices), recover their expenses incurred, in such proportions as they may deem it fair to fix (*y*), from the owners for the time being of the premises served by that length of sewer. It will be seen that this liability "runs with the land," and therefore purchasers should be careful to inquire as to the position before acquiring property. One of the standard questions in the usual form agreed between the Law Society and the local authority associations is designed to elucidate the necessary information, but not all local authorities are as informative as they might be in their replies. When a contingent liability has been disclosed, the physical condition and the number of properties served thereby, etc., of the particular length of sewer, should be fully investigated by a surveyor or other competent person. Liability under section 24 may involve the prospective purchaser in very great

(*v*) Under the P.H.A., 1936, s. 23, it is the responsibility of the local authority to "maintain, cleanse and empty" all public sewers vested in them.

(*w*) This is frequently an extremely difficult principle to apply, as the question of responsibility under the pre-1936 Act law depends on a number of factors and the interpretation of a complicated mass of decided cases: see the present authors' *Law of Sewers and Drains*, Chap. 5.

(*x*) 1936 Act, s. 24 (4) (b).

(*y*) Having regard to all the circumstances of the case, including those specified in the section. It is suggested that two notices should be served by the local authority, one of their intention to do the work, and the second of their apportionment of the expenses.

expense—not the least of which may be litigation expenses, for disputes between local authorities and landowners more frequently arise on this section than practically any other single section of the sanitary legislation.

(ii) The landowner may find the local authority wish to construct a public sewer and/or ancillary works in, under or over his land. This the authority may do under section 15 of the P.H.A., 1936, after giving reasonable notice to every owner and occupier of the land. The Act does not give any indication as to what is to be regarded as "reasonable" notice for the purposes of the section, but a local authority will rarely have any justification for acting precipitately in such a matter, and it seems that what is reasonable will depend on the facts of the case, including such matters as the extent of the disturbance which will be caused to the owner and occupiers concerned. There is no prescribed form for the notice, but clearly it must be unambiguous and indicate exactly the line of the intended sewer. As the local authority are in effect exercising compulsory powers, they will be strictly confined to the letter of the statute and the terms of their own notice, and if they go beyond those limits, an action in trespass will lie against them for damages, and/or an injunction—a similar remedy will be available if it can be established that the sewer will cause a nuisance (*z*). The powers of the section can be used only for the purpose of constructing a public sewer—not a private drain.

This assumption of a right—not, it is submitted, an "easement" properly so called (*a*)—to drive a sewer through a private owner's land, is not treated as being a compulsory acquisition of land such as will make it necessary for the local authority to pursue the ordinary procedure of compulsory acquisition (*b*), but an owner or occupier of land who has suffered damage as a consequence of the exercise of the local authority's powers is entitled to claim compensation under section 278 of the P.H.A., 1936, which will be assessed in accordance with the principles of the Acquisition of Land (Assessment of Compensation) Act, 1919, as amended by the Town and Country Planning Acts of 1947, 1953 and 1954. In any case of dispute, the amount of the compensation will fall to be determined by the Lands Tribunal (*c*), or if

(*z*) See, *e.g.*, *Lamacraft* v. *St. Thomas R. S. A.* (1880) 44 J.P. 441.

(*a*) See article by the present author, "Statutory Easements," *ante*, p. 208.

(*b*) *Thornton* v. *Nutter* (1867) 31 J.P. 419; this case is authority for the above proposition, but it also suggests that the right of s. 15 amounts to the grant of an easement. This, as above mentioned, is not sound, and compensation should be awarded on the grounds of the damage caused only, not as for the grant of an easement: see also *Thurrock Grays and Tilbury Joint Sewerage Board* v. *Thames Land Co., Ltd.* (1926) 90 J.P. 1.

(*c*) Lands Tribunal Act, 1949, s. 1 (3).

the amount does not exceed £50, by the local magistrates (on the application of either party) (*d*).

(iii) If a public sewer has been constructed through his land, and this sewer is shown on the local authority's sewer map (*e*), the landowner will not be able to erect any new building or extension of an existing building to which the building by-laws apply over that sewer without the consent of the local authority (*f*). It is for this reason that the existence of a public sewer under the land is regarded as an incumbrance which should be disclosed by a vendor (*g*); it is not, however, registrable in the local land charges register (nor is the notice to construct a public sewer served under section 15), as the restrictions on the use of the land by virtue of the existence of a public sewer are imposed by the general law, and do not amount to a "prohibition or restriction" imposed by the local authority (*h*). If a developer does wish to build over a public sewer, and the authority decide to consent thereto, they may impose conditions in their consent, and these conditions will be registrable (in Part IV) in the local land charges register.

(iv) The landowner will be responsible if the condition of his private sewer or drain is such as to be prejudicial to health or a nuisance (*i*). Proceedings may be taken against him by the local authority under the "nuisance clauses" (*j*) of the P.H.A., 1936, or (more appropriately, in these circumstances), under section 39. He may also be compelled to keep any sanitary apparatus at his premises in good order and condition, under a wide variety of provisions, such as the P.H.A., 1936, ss. 44, 45 and 47 (dealing with the adequacy and condition of closets at "buildings" generally), ss. 48–52 (dealing with cesspools, etc.), s. 46 (dealing with sanitary accommodation at "workplaces"), the Factories Act, 1937, s. 7 (sanitary accommodation—which must be "sufficient and suitable"—at factories), the Shops Act, 1950, s. 38 (suitable and sufficient sanitary conveniences at shops), the P.H.A., 1936, s. 89 (sanitary conveniences at inns and places of public entertainment, etc.), and the Food Hygiene Regulations, 1955 (*k*), made under the

(*d*) P.H.A., 1936, s. 278 (4).
(*e*) To be maintained under the P.H.A., 1936, s. 32.
(*f*) *Ibid.*, s. 25.
(*g*) *Pemsel and Wilson* v. *Tucker* [1907] 2 Ch. 191.
(*h*) Land Charges Act, 1925, s. 15 (7) (b), as amended by the Law of Property (Amendment) Act, 1926.
(*i*) This expression was discussed in some detail by the present author in an article at p. 265, *ante*.
(*j*) *i.e.*, ss. 92–100 thereof.
(*k*) S.I. 1955, No. 1906.

Food and Drugs Act, 1955, s. 13, controlling the provision and condition of sanitary accommodation at "food premises."

(C) The Duties of the Local Authority

Apart from their statutory duty to take action to secure the abatement of nuisances, etc., the local authority are given certain specific statutory duties in relation to the provision of sewers and drains. Thus:

(i) By section 14 of the P.H.A., 1936, it is made the duty of every local authority "to provide such public sewers as may be necessary for effectually draining their district for the purposes of the Act, and to make such provision, by means of sewage disposal works or otherwise, as may be necessary for effectually dealing with the contents of their sewers."

(ii) Section 31 of the same Act requires the authority so to discharge their functions under the Act as not to create a nuisance.

(iii) By section 23 of the Act they are required to "maintain, cleanse and empty" all public sewers vested in them.

From these sections, it seems reasonably clear that if as a consequence of some positive act taken by the local authority, some negligence or failure properly to maintain their sewers, the rights of a private landowner are infringed, such, for example, as where crude sewage is allowed to flow onto private land from a break in a sewer caused by negligence or faulty workmanship (*l*), or where a river is polluted by sewage effluent to the injury of a riparian landowner (*m*), an action for damages and/or an injunction must lie.

It is, however, clear that although the local authority cannot plead "nonfeasance" as a defence in these cases (*n*), as they can in cases arising out of the maintenance of highways, an action cannot be brought based solely on a failure to construct any sewer or sewerage system at all, where it could be argued that the authority are in breach of the statutory duty imposed on them by section 14 (*o*); the correct remedy here open to a person aggrieved is to make a formal complaint to the Minister of Housing and Local Government under section 322 of the P.H.A., 1936. Similarly, the courts will not allow an action to be brought which calls upon the

(*l*) But not if the damage was caused in circumstances of which the local authority could not have been aware and where negligence was negatived: see, *e.g.*, *Lambert* v. *Lowestoft Corporation* [1901] 1 Q.B. 590.

(*m*) As in *Pride of Derby and Derbyshire Angling Association* v. *British Celanese, Ltd.* [1953] Ch. 149.

(*n*) *Per* Denning L.J. in the *Pride of Derby* case (*supra*).

(*o*) *R.* v. *Epsom Guardians* (1863) 27 J.P. 468.

local authority to make a new system of drainage, as distinct from requiring them to use in a reasonable manner the sewers that are already vested in them (*p*). If a sewer has become surcharged by causes beyond the local authority's control (*q*), and as a consequence a nuisance is caused, the local authority will not be held liable, in the absence of any misfeasance or negligence (*r*). So far as the effluent from the local authority's sewage works is concerned, this must not contravene the provisions of the Rivers (Prevention of Pollution) Act, 1951, enforceable by the local rivers board. It should also be remembered that the discharge of effluent to watercourses from private premises is controlled by this Act, and in certain circumstances a purchaser of industrial premises discharging to a watercourse may find it advantageous to inspect the river board's register of new outlets and new discharges maintained under section 7 (7) of the 1951 Act.

(D) Conclusion

We have endeavoured to show in the foregoing remarks how important to the private landowner are these questions of drainage and, in particular, the distinction between public and private sewers. All public sewers are vested in the local authority (*s*), but it should be appreciated by the landowner who pleads as a defence in nuisance proceedings brought against him that the conduit causing the trouble is a public sewer and therefore the responsibility of the local authority, that this argument may redound against himself subsequently, for it is just this class of case where the local authority are in practice most likely to be able to establish that the length of sewer concerned is one to which section 24 of the 1936 Act applies, and so the expenses of maintenance will be recoverable from the landowners concerned. The importance to a prospective purchaser of fully understanding how the property is drained, and the status in law of the various conduits serving it, cannot be over-emphasised.

To make one final point, it should be appreciated that not

(*p*) See the judgment of Lord Halsbury in *Baron* v. *Portslade U. D. C.* (1900) 63 L.T. 363, and see *Law of Sewers and Drains*, at p. 52. In *Haigh* v. *Deudraeth R. D. C.* [1945] 2 All E.R. 661, the local authority were held responsible for a nuisance which had been caused by a sewer vested in them for a long time.

(*q*) It will be remembered that private landowners have a right to connect their premises to the public sewer, which the local authority are virtually powerless to control (see above).

(*r*) *Smeaton* v. *Ilford Corporation* [1954] Ch. 450.

(*s*) P.H.A., 1936, s. 20. It should be remembered that not only are these sewers the responsibility of the local authority, but also they are the property of the local authority, and therefore cannot be interfered with in any way without the consent of the local authority.

every sewer or drain vested in the local authority is a public sewer. Drains cannot be sewers (*t*), and sewers constructed by a local authority after October 1, 1937, solely for the purpose of draining property belonging to them (*e.g.*, a council housing estate) are not public sewers until they have been declared to be such (*u*). Further, a private sewer constructed under section 38 of the P.H.A., 1936, to enable buildings to be drained "in combination," is not to be deemed to be a public sewer simply because it was constructed by the local authority under that section, even if they bore some proportion of its cost (*v*). Conduits constructed as part of a highway, otherwise than in the course of private street works (*w*), are highway drains, and not public sewers, and a highway drain does not become a public sewer simply because a house drain has been unlawfully connected thereto (*x*). There is no right even for the surface water drains from a private street to be connected to the highway drain in an adjoining street maintained by the inhabitants at large, without the consent of the highway authority.

(*t*) In general terms, a sewer must drain more than one building not within the same curtilage.

(*u*) P.H.A., 1936, s. 20 (2).

(*v*) *Ibid.*, s. 38 (3).

(*w*) Under the Private Street Works Act, 1892, s. 150 of the Public Health Act, 1875, or appropriate local Act.

(*x*) *Rickarby* v. *New Forest R. D. C.* (1910) 26 T.L.R. 586.

REGISTRATION OF RESTRICTIVE COVENANTS

By R. Geoffrey Rowley, ll.d., Solicitor

Of the three types of land charge which cannot by their nature attach to the proceeds of sale, equitable easements and estate contracts have already been considered in articles in *The Conveyancer* (*a*) and it is proposed now to comment on the interpretation of "restrictive covenants" as defined by section 10 (1) of the Land Charges Act, 1925.

It is important to clarify the definition of registrable land charges, and particularly of those which cannot be overridden on a sale, since registration of a land charge within the statutory definition constitutes actual notice "to all persons and for all purposes connected with the land affected" (*b*), even to those who by virtue of other statutory provisions (*c*) have no opportunity of discovering the existence of a charge by the usual investigation of title; conversely, non-registration of a land charge which requires to be registered renders it unenforceable against a purchaser of the land intended to be affected (*d*).

The definition of a "restrictive covenant" in Class D (iii) is: "A covenant or agreement (not being a covenant or agreement made between lessor and lessee) restrictive of the user of land entered into after the commencement of this Act." The four constituents of the definition all require notice, and will be considered in turn.

1. A Covenant or Agreement

This terminology merely follows that of Lord Cottenham L.C. in *Tulk* v. *Moxhay* (*e*). The use of the word "covenant" is usual but not essential (*f*), and it is unnecessary for the document

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(*a*) See "Easements Rights and Privileges" by Mr. J. F. Garner in (1948) 12 Conv.(N.S.), p. 202, and "Registration of Estate Contracts" by the writer in (1955) 19 Conv.(N.S.), p. 99.

(*b*) L.P.A., 1925, s. 198.

(*c*) *e.g.*, L.P.A., 1925, s. 44 (1), as to root of title; s. 44 (2), as to investigation of freehold title by lessee.

(*d*) L.P.A., 1925, s. 199; L.C.A., 1925, s. 13 (2).

(*e*) (1848) 2 Ph. 774. The words "restrictive covenant or agreement" seem to indicate that the obligation need not be created by a document under seal although the Property Acts are loose in their terminology; the S.L.A., 1925, s. 61 (2), refers to "restrictive covenant or condition."

(*f*) *Cannock* v. *Jones* (1849) 18 L.J.Ex. 204, *per* Parke B.

containing the covenant to be executed by the covenanting party if he accepts some benefit under it (*g*). Section 53 (1) of the Law of Property Act, 1925, (which requires, for the creation of an interest in land, writing signed by the person creating the same, or his agent) will not, it appears, affect the position, for the corresponding provision of the Statute of Frauds did not do so (*h*). But it is not sufficient merely to convey property subject to certain covenants, without adding something in the nature of a contractual obligation (*i*). Subject to the operation of building schemes and of the doctrine of "no derogation from a grant," it is submitted that writing is necessary to the creation of a restrictive covenant, and there is no reported case where a parol agreement has been held to run with the land (*j*).

Building Schemes

Once the four constituents of a building scheme (*k*) are established, restrictive covenants imposed on plots within a defined area are mutually enforceable, on the ground that the community of interest in maintaining the restriction necessarily requires and imports reciprocity of obligation. The earlier suggestion that building schemes depended on an implied mutual agreement was rejected (*l*) on the ground that purchasers of building plots might buy at such intervals as to rebut any suggestion of contractual relationship.

The question arises as to what a purchaser of a plot, wishing to enforce covenants within a scheme against other purchasers, is to register. Obviously not the covenants in his own conveyance, since they only bind him. But in practice he can rarely obtain the information necessary to enable him to register the covenants contained in all the conveyances to his co-purchasers (*m*). Another view is that registration is unnecessary, and that a building scheme is enforceable by purchasers *inter se* notwithstanding that covenants

(*g*) *Formby* v. *Barker* [1903] 2 Ch. 539; *Elliston* v. *Reacher* [1908] 2 Ch. 665.

(*h*) *Cf.* also *Hall* v. *National Provincial Bank Ltd.* (1939) L.J.N.C.C.R. 185.

(*i*) *Re Rutherford's Conveyance* [1938] Ch. 396.

(*j*) In *Hodges* v. *Jones* [1935] Ch. 657 Luxmoore J. refused to rectify the land register to admit an oral collateral agreement restrictive of user.

(*k*) See the judgment of Parker J. in *Elliston* v. *Reacher* [1908] 2 Ch. 374.

(*l*) By Lord Macnaghten in *Spicer* v. *Martin* (1888) 14 App.Cas. 12.

(*m*) Yet Jolly on *Restrictive Covenants*, p. 31, adopted the view that this was the proper course, "If a purchaser of part of an estate purchases under a building scheme created after 1925 and enforceable by the purchasers *inter se*, it appears to be necessary for him to register the restrictions against all the other purchasers, an extremely difficult task since he would not necessarily know the names of such purchasers."

imposed on them individually after 1925 are not registered (*n*). Otherwise, it is argued, an estate developer could destroy the scheme, in whole or in part, merely by neglecting to register covenants against his purchasers.

The only relevant authority is *Newman* v. *Real Estate Debenture Corporation* (*o*), where a lessor and lessees of flats had entered into covenants in such a way as to create a building scheme, and the lessor's assignee was sued by one lessee for a breach. It was contended that a building scheme is not a "covenant between lessor and lessee" and therefore requires registration: that if one lessee sues another lessee, the covenant on which he is being sued is not a covenant "between lessor and lessee." Atkinson J. confined himself to observing that "the Company is not being sued as lessee of one of the flats, but is being sued as owner of the leasehold reversion bound by the late lessor's covenant and these covenants are not capable of registration." This leaves open the question whether the same result would have been reached had one of the other lessees been sued under the scheme. It seems that if a covenant is not registrable when the lessor is sued, the same covenant is still not registrable if another lessee is sued; to hold otherwise would be to raise a doctrine of subjective registrability.

To this it may be answered, that in a building scheme a purchaser sues not on a covenant with a common vendor, but on a mutual obligation arising in equity. It is suggested that this theory is untenable for three reasons:

(1) In *Hollington Bros. Ltd.* v. *Rhodes* (*p*) it was argued that a purchaser knowing in fact of an unregistered estate contract must take subject to it in equity, but Harman J. observed: "I do not see how that which is void and is not to prejudice a purchaser can be validated by some equitable doctrine."

(2) The effect of a building scheme is to extend the benefit of the covenants entered into with a common vendor to the purchaser of other lots, not to create a new burden, *i.e.*, it makes an existing burden enforceable by a wider range of people, but no more creates a new burden than does the assignment of the benefit of a restrictive covenant to a purchaser of part only of the dominant land. The registration provisions can affect only the passing of the

(*n*) See "Points in Practice" (1934) 78 S.J. 486, where this is suggested.
(*o*) [1940] 1 All E.R. 131.
(*p*) [1951] 2 All E.R. 579.

burden, not the passing of the benefit, consequently the common vendor must after 1925 register the covenants imposed against the purchaser of each lot.

(3) Unless this construction is adopted, most confusing situations may arise. If A sells houses on a building estate to B and C in 1925 and to D and E in 1926, as against A the covenants by B and C do not require registration, but the equitable obligation to D and E does not arise until 1926. Are pre-1926 covenants then to become registrable *ex post facto*? The burden of covenants is imposed on one plot of land, whilst the benefit may attach to many, and to regard this burden as being registrable only at the instance of the original covenants and primary beneficiary, whilst it certainly gives rise to difficulties if this covenantee fails to register, at least avoids the more pressing problems which any other solution would create.

No Derogation from a Grant

In addition to the equitable obligation arising in the case of restrictive covenants, an implied restriction on the use of land may arise from the doctrine of "no derogation from a grant" and the obligation so arising has been described as an implied covenant not to do anything which will render the land unfit to be used for the particular purpose for which the grant was made, and analogous to a restrictive covenant (*q*). Such an obligation may run with the land in equity, but in the only reported example of such an obligation binding the successors in title of the grantor, *Newman* v. *Real Estate Debenture Corporation* (*r*), the question of registration of the equitable obligation was not raised. Atkinson J. held that a landlord of a block of residential flats had impliedly covenanted not to derogate from his grant, and that by assigning the reversion in the major part of the building to a company which used it for business purposes, the implied covenant had been broken. It is clear that, as against the original landlord, registration was unnecessary (*s*); and it is submitted below that the exception of covenants "between lessor and lessee" would not exempt a covenant relating to a landlord's retained land from registration. The question remains, whether the implied obligation, analogous to a restrictive covenant, is capable of registration as a restrictive covenant under the Land Charges Act, 1925.

(*q*) *Browne* v. *Flower* [1911] 1 Ch. 219, *per* Parker J.
(*r*) [1940] 1 All E.R. 131.
(*s*) *Wright* v. *Dean* [1948] 2 All E.R. 415.

It may be contended that the registration provisions are not in terms limited to express covenants, and that the policy of the Acts would require implied covenants to be registered. Such suggestions are to a certain extent borne out by *White* v. *Bijou Mansions Ltd.* (*t*), where Simonds J. rejected the argument that an equitable obligation arising from the application of the doctrine of "no derogation from a grant" arose, but observed: "There is no notice of such an obligation on the register, and it appears to me that I have no right to charge the lessee with notice of any such obligation any more than I have the right to charge him with notice of some express covenant which had not been entered on the register." The fact that the alleged implied covenant arose in 1886 did not resolve the question, since the land was registered, and the passage certainly presupposes that the equitable obligation, if and when it arises, can be noticed in the Land Register. Yet the decision in *Newman* v. *Real Estate Debenture Corporation* (*r*) involves the contrary assumption.

It is submitted that both cases, which are in fact decided on other grounds, merely skirt the question of the registrability of an implied obligation; that the existence of such an obligation being always a matter of doubt and frequently a matter of contention, the number of precautionary registrations which would become necessary would seriously hamper many titles and interfere with the smooth running of the registration system; that the register is designed to cover express covenants only and not restrictions arising by operation of law. Whilst practical convenience is certainly no conclusive guide to the interpretation of the 1925 property legislation, in the absence of any clear authority to the contrary it is submitted that implied restrictions are excluded from the policy of registration.

2. Restrictive of the User of Land

Whilst in the case of leaseholds both positive and negative covenants which "touch or affect the thing demised" run with the land, the relationship by estate creates different problems from those arising in the case of a tenurial relationship, and on the sale of freeholds or assignment of leaseholds it is recognised that no burden of covenants runs with the land at law (*u*), but only an equitable obligation confined to negative covenants. The covenants need not be negative in form, provided that they are

(*t*) [1937] Ch. 610.

(*u*) *Austerberry* v. *Oldham Corpn.* (1885) 29 Ch.D. 750; *Re Fitzherbert-Brockholes Agreement* [1940] Ch. 51.

restrictive in substance, and a mere covenant of indemnity is not a restrictive covenant (*a*). But just as the legislature can enact that a purchaser of land has notice of restrictive covenants when he cannot possibly have had such notice (and conversely that a purchaser who knows of unregistered land charges has no notice of them), so it can enact that certain positive covenants are to be enforceable and registrable as restrictive covenants (*b*).

3. Entered into after the Commencement of this Act

It will be noticed that only covenants entered into after 1925 are capable of registration, and pre-1926 covenants remain subject to the old law as to notice. In practice it will be found that very many, if not most, of the restrictive covenants effected prior to 1926 are no longer enforceable, since until recently (*c*) the importance of the requirements for annexation of the benefit of covenants was not widely recognised, and in particular the identification of the dominant tenement was frequently ignored.

4. Not being a Covenant or Agreement made between Lessor and Lessee

The apparent intention of this exception was to exclude from registration covenants by a lessee affecting the land demised, since notice of such covenants is given by the lease itself, which will form part of the title to the leasehold estate until its expiration or determination, whereas a conveyance of freehold land imposing covenants might cease to form part of the title which a purchaser could investigate after thirty years. Further, since the burden of leasehold covenants runs with the land at law independently of notice, there is not the same necessity for protecting the equitable obligation against destruction. It is true that the existence of actual or constructive notice of leasehold covenants cannot be universally assumed, since a sub-sub-lessee is not affected with notice of covenants contained in the head lease, but in practice the covenants will be repeated in each underlease, and as a matter of administrative convenience it was no doubt justifiable to exclude leasehold covenants from registration.

The exception is, however, phrased in terms wider than necessary to achieve this object. A covenant "made between lessor and lessee" would appear, for instance, to include a lessor's

(*a*) *Harris* v. *Boots Cash Chemists (Southern) Ltd.* [1904] 2 Ch. 376.
(*b*) *e.g.*, Water Act, 1945, s. 15.
(*c*) *Re Union of London and Smiths Bank Conveyance* [1933] Ch. 611; *Zetland* v. *Driver* [1939] Ch. 1.

covenant in a lease that he will observe restrictions on his adjoining land (*d*). The expression "covenant having reference to the subject-matter of the lease" could have been incorporated from sections 141 and 142 of the Law of Property Act, 1925, to ensure that the exception would cover only those leasehold covenants which run with the land at law, and would not extend to a lessor's covenants binding other land. The literal construction of the exception with regard to such lessor's covenants has been expressed (*e*) as follows: "Such a covenant on the part of the lessor, whether contained in the lease or, presumably, in a supplemental document, is not registrable, and the purchaser of the burdened land from the lessor is as to notice of such a covenant in the position of a purchaser before 1926." The proponents of this view suggest that a lessee should protect himself by stipulating that a memorandum of such a covenant should be indorsed on one of the title deeds of the burdened land (*f*), but whilst such an indorsement may serve as to purchasers of the freehold for a period of thirty years, the abolition of the rule in *Patman* v. *Harland* (*g*) would still allow a lessee of such adjoining property to take free from the burden of the covenant.

The difficulty of this construction is that once it is adopted the logical extension leads to absurdities. If A lets Whiteacre to B, and during the continuance of the lease sells Blackacre to B, imposing restrictive covenants in the conveyance, are these to remain unregistered because the relationship of the lessor and lessee subsists between the parties with regard to other property? Obviously the words "lessor" and "lessee" must relate to the lessor and lessee of the land whose user is restricted. An analogous position (*h*) has arisen with regard to estate contracts, which must under the Land Charges Act definition (*i*) be created by an estate owner or by a person entitled to call for a legal estate, and Asquith L.J. has observed (*k*) that a limitation must be engrafted on the literal meaning: "The estate owner must have an estate of some sort in the same lands in respect of which he contracts to convey

(*d*) As in *Ricketts* v. *Enfield Churchwardens* [1909] 1 Ch. 554.

(*e*) Preston and Newsom on *Restrictive Covenants*, 1st ed., 1939, p. 44, (1938) 3 Conv.(N.S.), p. 147.

(*f*) L.P.A., 1925, s. 200.

(*g*) (1881) 17 Ch.D. 353; L.P.A., 1925, s. 44 (5).

(*h*) Though the writer acknowledges with feeling the observation of Romer L.J. in *Grant* v. *Edmondson* [1931] 1 Ch. 1, at p. 28, "In connection with the subject of covenants running with the land it is impossible to reason by analogy."

(*i*) L.C.A., 1925, s. 10 (1), Class C (iv).

(*k*) *Sharp* v. *Coates* [1949] 1 K.B. 285, discussed in (1955) 19 Conv.(N.S.), at p. 102.

or creates an estate in favour of someone else." Similarly, it is suggested that with regard to restrictive covenants the words "lessor" and "lessee" must be construed in relation to the land upon which the restriction is to be imposed, that is, that the definition should read "A covenant or agreement restrictive of the use of land (not being a covenant or agreement made between the lessor and lessee of that land) . . ." (*l*).

Covenants affecting a lessor's retained land should certainly be within the policy of registration, and a consideration of the exception in its full context reinforces the conclusion "that the section assumes that the land the use of which is restricted is land in respect of which the relationship of lessor and lessee exists when the covenant is entered into" (*m*).

Mode of Registration

It is provided in section 10 (2) of the Land Charges Act, 1925, that "a land charge shall be registered in the name of the owner whose estate is intended to be affected," yet it appears that restrictive covenants can be imposed on land in respect of which the covenantor is not the estate owner. Thus, in *L. C. C.* v. *Allen* (*n*) the covenantor had only an option to purchase, which he exercised some eighteen months after entering into a restrictive covenant. Although the question whether the covenant could run with the land was not argued (*o*) the Court of Appeal seem to have assumed that it could have run had defined land been retained by the covenantee, and, if this is so, it appears that an equitable interest alone is sufficient to enable the covenantor to bind land, at any rate where he subsequently becomes entitled to the legal estate.

It is submitted that on the question of the interest to be held by the covenantor the courts would follow the authorities which settle the problem of the interest to be held by the covenantee, who must have either the whole legal estate or the whole equitable interest in the dominant land: thus, a covenant with a tenant for life holding the legal estate under the provisions of the Settled

(*l*) It is arguable that this construction is supported by the reference in L.P.A., 1925, s. 200, to the obligation to register a land charge in respect of "any restrictive covenant or agreement affecting freehold land." If it was intended to equate this with the Class D (iii) definition, the equation is unfortunately incomplete as restrictions may be imposed on the assignment of leaseholds which are neither "affecting freehold land" nor "made between lessor and lessee."

(*m*) (1937) 2 Conv.(N.S.), p. 26.

(*n*) [1914] 3 K.B. 642.

(*o*) The original covenantor was contractually liable, and a purchaser from him was not liable as the covenantee had retained no land capable of benefiting.

Land Act, 1925, can run with the land (*p*), as could a covenant with a pre-1926 mortgagor in fee, who had no legal estate but only an equity of redemption (*q*).

No difficulty will normally arise in the case where restrictive covenants are imposed on land conveyed and by the conveyance, nor in the less frequent case where they are imposed on vendors in respect of land adjacent to the land conveyed, provided that the prerequisite of a priority notice is observed, to accelerate the effect of registration to the date of actual completion. But, as the Act imposes no time limit for registering land charges, there may be complications when registration is postponed. By virtue of the Land Charges Act, 1925, s. 13 (2), a restrictive covenant is unenforceable against a purchaser of a legal estate for money or money's worth unless registered before the completion of the purchase: it may happen that the property affected by a restrictive covenant will devolve on a third party by gift, by transmission on death or insolvency, or by a marriage settlement, and it seems that if a covenant is not registered at its inception, it must be registered against the estate owner at the date of registration (*r*).

One final point should be borne in mind by solicitors acting for local authorities: that a restrictive covenant in favour of such an authority should be registered as a local land charge instead of as a land charge Class D (*s*).

(*p*) *Zetland* v. *Drives* [1939] Ch. 1.
(*q*) *Manners* v. *Johnston* (1875) 1 Ch.D. 673.
(*r*) See (1955) 19 Conv.(N.S.), at p. 104.
(*s*) L.C.A., 1925, s. 15 (7).

THE LATEST FINANCE ACT: A SUMMARY

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Passing rapidly over Part I of Finance Act, 1956, and noting with due reverence that intoxicating liquors which are not cider shall not be deemed to be cider but, on the other hand, shall be deemed sweets, and pausing but momentarily to regret that turning the old vehicle into a car at the week-ends is a taxable pursuit, we find with relief that the standard rate of tax is unchanged at eight shillings and sixpence in the pound (s. 8).

A crumb of comfort is then extended by section 9 exonerating from income tax but not surtax the first £15 of interest on deposits with the Post Office Savings Bank or a seamen's savings bank or ordinary deposits with a trustee savings bank (*a*). Each and every person can gain up to £15 tax free interest in this way, for the aggregation of the income of certain husbands and wives for tax purposes (*b*) does not prevent them each having £600 earning non-taxable income in the Post Office. This section, considerably lightening the work of the Revenue, holds little joy for the high rate surtax payer, for although he receives the benefit of relief for income tax purposes, so far as surtax is concerned the exempted interest is *grossed-up* at the standard rate and added to his total income for that assessment.

Next we find in section 10 that Schedule E has acquired the class distinction of its alphabetical predecessor. In future, that is from 1956–1957 onwards, the emoluments of an office or employment are no longer to be charged under Case V of Schedule D or under any of the present provisions of Schedule E, but under the three Cases of Schedule E established by the new paragraph 1 of that Schedule as inserted by section 10, Finance Act, 1956. Case I comprises all emoluments, other than foreign emoluments, from the office or employment of a person *resident and ordinarily resident* in the United Kingdom unless the duties are performed wholly outside the United Kingdom. Case II comprises any emoluments, other than foreign emoluments, in respect of duties performed in the United Kingdom of a person *either not resident or not ordinarily resident*

(*a*) Subss. (3) and (4) of s. 9 provide for similar relief to extend to interest on deposits with a savings bank maintained under a local Act subject to the certificate of the Treasury to be granted on certain conditions subject to revocation.

(*b*) Income Tax Act, 1952, s. 354

in the United Kingdom. Lastly, Case III covers the emoluments of a person *resident* in the United Kingdom received in the United Kingdom in respect of the year of assessment in question (whether received in that year or in an earlier year) or for an earlier year when resident. These Cases must be read in conjunction with the new rules in the Second Schedule (*c*). The foreign emoluments exempted from Cases I and II are " the emoluments of a person not domiciled in the United Kingdom from any office or employment under or with any person body of persons or partnership resident outside and not resident in the United Kingdom." These emoluments fall to be taxed, as hitherto, on the remittance basis, now provided by Case III. Incidental duties performed within the United Kingdom may be treated as performed outside the United Kingdom if in substance the duties are outside (*d*). On the other hand, duties under the Crown or performed on a ship or plane beginning and ending its trip in the United Kingdom are treated as performed within the United Kingdom (*e*).

A place of abode (rather less than a home) maintained in the United Kingdom for the use of a person will not be taken into account any longer in determining his status as resident or not if he works full time in a trade, profession, vocation or employment not carried on in the United Kingdom (s. 11). Again, duties incidental to those in substance performed outside the United Kingdom under an office or employment will be notionally transported. Before fully rejoicing at the abolition of the previous somewhat arbitrary distinction between the hotel guest and the man with a pied-à-terre, note should be made that personal allowances depend on residence.

Section 12 operates, and does so retrospectively, to allow the spreading back to the year in which the income arose of delayed remittances of overseas income, *i.e.*, that taxable under Cases IV or V of Schedule D or the new Case III of Schedule E. The delay must not have been due to illness on the part of the taxpayer but to laws or executive action or lack of foreign currency in the territory where the income arose. Pension benefits granted retrospectively are treated as arising in the year in respect of which they are so granted. A claim must be made and that within six years (*f*).

After noting with approval the exemption of V.C.s' pensions from income tax and surtax (*g*), and nodding assent to the

(*c*) Replacing for the purposes of Cases I, II and III the rules in the Income Tax Act, 1952, Ninth Schedule, save paras. 7 and 8 relating to expenses, and para. 2 (so far as it relates to persons dying).
(*d*) Second Sched., para. 5.
(*e*) Second Sched., para. 6
(*f*) s. 12 (6)
(*g*) s. 14.

deduction from M.P.s' salaries of their contributions to the House of Commons Members' Fund (*h*), the provision giving effect to the announcement early this year as to the suspension of investment allowances is found (*i*). This does not affect expenditure in so far as it consists of sums payable under a contract entered into not later than February 17 this year. Expenditure on ships, certain fuel-saving equipment, including industrial and scientific research, still gains the benefit of this allowance (*k*).

The allowance in respect of works, factories and other similar premises is extended, for the last time according to *Hansard*, for a further three years (*l*). For capital allowances in respect of expenditure on industrial buildings and structures such expenditure will now include that incurred in preparing, cutting, tunnelling or levelling land; where the land was so treated for the installation of machinery or plant the latter may be treated as a building or structure for the purpose of allowances (*m*). Section 17 then allows certain capital allowances (*n*) in respect of expenditure on dredging.

Until now, the rich residuary beneficiary of a wealthy person's estate might have suffered tax at more than twenty shillings in the pound. Income accruing prior to the death was subject to both estate duty in the estate and surtax in the hands of the residuary beneficiary who notionally receives it under Part XIX of Income Tax Act, 1952. This situation is now alleviated by the deduction from the residuary income for surtax purposes of a sum estimated by reference to the estate duty liability (*o*). The income accrued before death less liabilities and standard rate tax, must be compared with the principal value of the estate. That proportion of the estate duty (calculated at the full rate and without reliefs) payable grossed-up at the standard rate is deductible from the residuary income. The section is not retrospective and only has effect as respects tax for the year 1956–1957 and subsequent years of assessment.

Tax evasion by non-disclosure is then dealt a hefty blow by section 20, which increases considerably the power of the Revenue to demand returns of payments made. Payments made in respect of copyrights, whether periodical or lump sums, and payments for services rendered by persons other than employees must be returned (if required) by persons carrying on a trade or business, or a body

(*h*) s. 13.
(*i*) s. 15.
(*k*) s. 15 (1), (2), (3), (6), (7), and Finance Act, 1954, s. 16 (1).
(*l*) s. 18: Finance Act, 1937, s. 15.
(*m*) s. 16.
(*n*) Initial allowance one-tenth; annual allowance one-fiftieth.
(*o*) s. 19.

of persons carrying on any activity. This does not apply to payments from which tax is deductible or where, in respect of any payee, the return would disclose less than £5. Payments made in a year of assessment ending more than three years before the notice requiring a return need not be mentioned. Easy avoidance of the section is prevented by references to the making of payments, including references to the giving of valuable consideration (*p*). Failure to make returns is guarded against by imposing a £50 penalty until judgment for such penalty, and £50 per day thereafter until the return is given.

Assessments in respect of specified classes of activity under Schedule D (in respect of a trade, profession or vocation) can be made in one or more divisions if the Commissioners so direct. The Revenue may thus concentrate their knowledgable servants, a practice which may react both favourably and unfavourably to the taxpayer.

We then leave Part II for the sunnier climate of Part III, which provides the first substantial reliefs in the realm of retirement and other annuities. These provisions being discussed at length elsewhere in this issue, we pass on, slightly revivified, to meet the gloom of a 30 per cent. profits tax with 27 per cent. non-distribution relief (*q*), and the statutory reversal of the decision in *Heelex Investments, Ltd.* v. *C. I. R.* [1955] 1 W.L.R. 289. A subsidiary company and a principal company can no longer escape profits tax on both by a surtax direction on one of them whilst a grouping notice is in force, the grouping notice in general terms not now taking effect during the period covered by the surtax direction, save in respect of non-distribution relief (*r*). Further, a principal company cannot give a grouping notice in respect of a subsidiary unless each of them is engaged in carrying on a trade or business or each of them was so engaged at the beginning of the first chargeable accounting period affected: the grouping notice will cease to have effect if either company ceases its trade or business or to be resident in the United Kingdom (*s*).

By section 31, *C. I. R.* v. *Universal Grinding Wheel Co., Ltd.* [1955] A.C. 507, then follows the fate of *Heelex*, and premiums on reduction of share capital or repayment of loans (*i.e.*, anything in excess of what is received by the borrower) become gross relevant distributions to proprietors for profits tax purposes in every and

(*p*) s. 20 (7).
(*q*) s. 29: consequential provision on the increase in the Fourth Schedule.
(*r*) s. 30 (2), (4), (5).
(*s*) s. 30 (1) and (2).

director-controlled companies respectively. Where a share premium account is used to pay the premium, it will not be regarded as a distribution but nevertheless the exemption for distribution of capital in section 35 (1) of the Finance Act, 1947, will be reduced. Those who made their premium arrangements on redeemable preference shares prior to April 16, 1947, and have not varied those arrangements other than by increase or reduction of the amount payable will not be affected save that the least amount payable at any time after that date will be the greatest amount exonerated from being a distribution (*t*). In addition, where before that date the rights attached to issued shares included a right of priority as respects capital for a sum in excess of the nominal amount of the shares (not being a premium on redemption of preference shares) a like exemption is granted (*u*).

The inevitable approach of estate duty, so depressing to all save perhaps the addicts of "State above all," is rendered slightly less formidable by Part V. The extension of "surviving spouse" exemption by Finance Act, 1954, s. 32 (2), to cases where no duty was paid on the first death because of the smallness of the estate has now been logically completed by including the case of the nil or insolvent estate left to the widow or widower (*a*). The exemption is granted provided the second death occurs after August 2, 1956.

The country's cultural heritage receives attention in the extension of the power of the Commissioners to accept chattels in satisfaction of duty if they are or have been kept in state or certain other buildings. Whereas under Finance Act, 1953, s. 30, which remains in force, the chattel might be any chattel but its situation was limited, under section 34 of the new Act the situation is irrelevant but the chattel must be a "work of art which the Treasury are satisfied is pre-eminent for its aesthetic merit or historical value." Section 34 also extends the relief on certain objects of national, scientific, historic or artistic interest on sale to the National Gallery or certain other institutions (*b*) to such objects when sold to the Minister of Works under the Historic Buildings and Ancient Monuments Act, 1953.

Section 33 enacts a permanent scheme for relief from duty paid or to be paid on an interest in land by reference to the price or compensation paid under a compulsory acquisition pursuant to a notice to treat or agreement served or made by or with a public authority within five years of the valuation for duty purposes.

(*t*) s. 31 (5).
(*u*) s. 31 (6).
(*a*) s. 36.
(*b*) Finance Act, 1930, s. 40 (2), proviso.

Subsection (2) requires an identity of circumstances at the death and at the date of acquisition as to the interest concerned and its incidents, the persons taking or selling and the state of the land, but subsections (3) and (4) allow adjustments to be made where the circumstances differ in some respects. The general effect is to reduce the amount on which duty is paid or payable to the amount of the compensation or price payable on the purchase plus compensation under Part III of the Town and Country Planning Act, 1954, or its Scottish equivalent. Where duty has been paid or is payable in respect of part only of the interest forcibly extracted from the citizen relief may still be gained, the Commissioners having power to make a repayment or remission of such amount as may seem to them to be "just and reasonable" (*c*). The section is to a certain extent retrospective in operation, applying where valuation for estate duty was made after November 18, 1952, and even though the compulsory purchase or acquisition has already been made (*d*).

The beneficial axe reducing Revenue claims also falls to some extent on the two recent decisions in *Re Longbourne, Decd.* [1952] 2 All E.R. 933 (*e*), and *Re Lambton's Marriage Settlement* [1952] Ch. 52 (*f*). As the result of these two cases somewhat severe rules were established whereby although previously the same person was entitled to part of the income of settled property both before and after a death (in the one case as an annuitant whose interest was not limited to the life of the deceased, and in the other as an annuitant whose interest is so limited but who nevertheless takes a further interest in the property after the death) duty was exigible on the whole settled fund passing on the death with only the deduction of the actuarial value of the continuing annuity and no deduction in the other case. Section 32 supplies the requisite relief, though with certain specific exceptions, by in essence allowing a "slice" deduction from the property passing equal to the capital necessary to produce the annuity or continuing right to income. By subsection (1) any settled property passing on a death by reason of the termination of an interest limited to cease on death being then subject to a continuing annuity will be reducible for duty purposes by the capital producing the annuity or the reduced amount of the annuity after death where applicable (*g*). This only affects deaths *after* August 2, 1956, and settlements made *otherwise* than by the

(*c*) s. 33 (2) (a) and (b).
(*d*) s. 33 (6).
(*e*) s. 32 (1).
(*f*) s. 32 (3).
(*g*) s. 32 (2).

deceased or directly or indirectly at his expense or out of funds provided by him. Subsection (3) then extends the relief to the parallel case where the annuity ceases but the annuitant becomes " beneficially entitled in possession to some other interest in the settled property or the income thereof " by, in effect, treating the annuity or the income value of the post-death interest whichever be the lesser as a continuing annuity. The collateral claim on property thus exonerated from duty by reason of " competency to dispose " is barred unless the deceased had been so competent *and* had disposed by the exercise of a power conferred by the settlement or the interest devolved on his personal representatives as assets for the payment of his debts (*h*). These provisions would appear to prevent abuse of the relief granted by the section by, *inter alia*, the judicious use of a general power of appointment granted by the settlement. The notional extension of liability to duty on interests limited to cease on death where they have been disposed of or determined, under Finance Act, 1940, s. 43, is accorded the relief in the same manner as if it had not been so dealt with (*i*). Finally, it should be noted that entailed property passing on the death of the tenant in tail in possession whether under the entail or to the remainder interest will be allowed to be reduced in value for duty purposes on account of annuities payable thereout.

Part VI grants joy to the purchaser of small properties in the way of reduced stamp duty. As for Part VII, after noting provision for the exoneration of certain Indian, Pakistan and colonial pensions from tax and duty (*k*) and the seven hundred million pounds available to nationalised industries (*l*), we find that the tax and duty payable (*m*) by persons interested in the residue of unadministered estates is lightened by the clarification of the meaning of charges or residue to include " any sum payable out of residue to which a person is entitled under the law of intestacy in any part of the United Kingdom or in any other country " (*n*).

After this somewhat brief summary of the Act may we wish you " Good luck with your premium bonds " (*o*).

(*h*) s. 32 (4) and (5).
(*i*) s. 32 (7).
(*k*) s. 40.
(*l*) s. 42.
(*m*) Part XIX, Income Tax Act, 1952, and Finance Act, 1938, s. 47.
(*n*) s. 41.
(*o*) The road is opened by s. 44.

THE NEW PROVISIONS RELATING TO RETIREMENT AND PURCHASED LIFE ANNUITIES

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The Chancellor of the Exchequer has continued the work of his immediate predecessors in gradually introducing into the tax law the recommendations made by the series of Committees and the Royal Commission on Taxation. Part III of this year's Finance Act represents a valiant effort to give legal effect to some of the main recommendations of the Committee on the Taxation Treatment of Provisions for Retirement (Cmd. 9063). These provisions, although introducing a substantial measure of relief for the self-employed and non-provided for employees (including " controlling directors "), does not put them on a par with persons benefiting under the existing approved schemes and funds for employees, the main difference being that no commutation of the life annuity is permissible.

Part III of the Finance Act, 1956, deals with the income tax treatment of " retirement and other annuities " under two separate heads. These comprise " retirement annuities," in sections 22 to 26, and " annuities other than retirement annuities," in section 27. Administrative matters relating to both kinds of annuities are dealt with in section 28. In addition, the Third Schedule to this Finance Act must be referred to, as to the holders of what is known as " pensionable office or employment," and the extension of the amount of the allowable premiums for individuals born in or before 1915.

Since the Finance Act was passed Regulations have been made by Statutory Instrument, No. 1230 of 1956, entitled " The Income Tax (Purchased Life Annuities) Regulations, 1956." These have been made in accordance with section 28, Finance Act, 1956, and came into operation on August 15, 1956.

The only other provision of the Finance Act, 1956, which may be considered as relevant is section 35, relating to the estate duty on any contract approved by the Commissioners of Inland Revenue under section 22. It should, perhaps, be mentioned that sections 379 and 386 to 391, Income Tax Act, 1952, have not been repealed or modified, and remain in force. Thus, the old provisions may

still be taken advantage of by those to whom they are applicable, and some individuals may be able to obtain relief partly under the old and partly under the new provisions. In some circumstances a person may be able to obtain a greater benefit by making provision for his old age by means of life assurance, coupled with the new provision which gives exemption from tax on the capital element of a purchased life annuity.

It is proposed in this article not to deal with the Act section by section, but to consider the relief afforded primarily from the point of view of the individual. For convenience, "Retirement annuities" will be discussed first (in Part I), including the administrative provisions applicable, and then (in Part II) purchased life annuities, other than retirement annuities, will be considered. The Regulations relate only to the latter, whereas the Third Schedule to the Finance Act, 1956, is relevant only to the former.

I. Retirement Annuities

The persons who are entitled to claim benefit under the new provisions are all those who have "relevant earnings" in accordance with section 22 (1) (a), and as defined in section 22 (8). The distinction between relevant and net relevant earnings is discussed in more detail later, but for the purpose of being in a position to make a claim the individual must be in receipt of earned income apart from "pensionable employment," defined in section 22 (9) as one to which a "sponsored superannuation scheme" relates. The latter includes the funds and schemes approved under the legislation in sections 379 and 388, Income Tax Act, 1952. Thus, the main classes of persons who will now be able to benefit are business and professional persons working solely or in partnership (other than sleeping partners); controlling directors with the one exception of the controlling director of an investment company; and salaried employees who are either not eligible to be a member of a sponsored scheme or have not in fact joined such a scheme. The total number of persons in these categories probably totals at least ten million.

The sole criterion is that the claimant must be entitled to earned income as calculated for tax purposes (see section 525, Income Tax Act, 1952), other than from "pensionable" employment. As originally drafted, the Bill excluded from participating under the new provisions anyone who held "pensionable" employment, but this was amended during the passage of the Bill so as to bring in the "two job" man as he is called, for example, a solicitor in practice holding a small pensionable office.

Relevant and net relevant earnings

Relief may be obtained only by setting off the amount of the allowable premium or contribution against earned income, and for this purpose there are two definitions of earnings to be considered. These are the relevant, and the net relevant, earnings, but it is the latter figure which is perhaps the more important as this fixes the basis for calculating the maximum amount of premium allowable in each year.

The " relevant earnings " are defined in section 23 (4) to be the individual's earned income as assessed to tax *before* giving effect to any allowances due under Parts X or XI of the Income Tax Act, 1952 (other than those allowable in the computation of profit), but after taking into account any amounts on which charges fall to be made. This means that capital allowances which are deductible from the amount assessed, such as balancing and annual allowances, are not to be deducted in calculating the amount of the relevant earnings. Capital allowances which are assessed are, however, included, as for example, balancing charges.

" Net relevant earnings " are defined in section 23 (5), and these are the amount of the individual's relevant earnings *after* deducting annual payments, such as charges, and also losses, and allowances under Parts X and XI of the Income Tax Act, 1952, but excluding any for the years before 1956–1957.

Although the amount of the qualifying premium or contribution is allowable against the relevant earnings, the amount which can be so allowed for any year of assessment is restricted to the appropriate percentage (depending on the year of birth) of the net relevant earnings (subject to an absolute maximum, discussed later). For this reason section 23 (6) and (7) make provision for adjustment of the net relevant earnings for subsequent years, if any deduction under section 23 (5) (b) has been made from other income which would fall to be made in calculating the net relevant earnings if sufficient. Both the relevant, and the net relevant, earnings are computed for an individual, and for the purpose of relief the earned income of a married woman must be calculated separately from that of her husband, the claim of each being dealt with on the basis that the husband and wife are two separate claimants. Each partner, in the case of a partnership, is dealt with as entitled to his share of the partnership assessment, divided in accordance with the usual method of computing each partner's share for the purposes of income tax and surtax. This will be the division for the year of assessment, retaining partnership charges against partnership income. In computing the net relevant earnings no deduction is

made for any relief due under Part III, Finance Act, 1956, in respect of an allowable premium or contribution.

There is no particular mystery about the deductions from relevant earnings to arrive at the net relevant earnings if it is remembered that the object is to ascertain the net amount of the claimant's earnings for tax purposes over the period for which relief is claimed under Part III of the Finance Act, 1956. The deduction of annual payments, falling within section 169 or section 170, Income Tax Act, 1952, will reduce the net relevant earnings insofar as such charges can only be retained against the relevant earned income. As regards losses, and capital allowances due under Parts X and XI of the Income Tax Act, 1952, if these are allowed against income other than the relevant earned income, for any year of assessment (*e.g.*, by reason of the earned income assessed being insufficient), the amount so allowed is to be deducted against the relevant earnings for the immediately following year so far as practicable, and so on, for succeeding years, until exhausted.

In some circumstances assessments are subsequently reduced or increased by additional assessment, and where the net relevant earnings are thus affected the amount of the allowable premium or contribution will be recalculated in accordance with the revised figures.

Approval of Contracts

A "qualifying premium" within the meaning of section 22 (1) (b) can be paid only under a contract approved by the Inland Revenue which has for its main object the provision for the individual effecting the contract of a life annuity in old age. The contract can be approved, subject to the conditions discussed later, if it is made with a life assurance company (or similar institution), or with the trustees of a trust scheme within the meaning of section 22 (5).

Section 22 (2) provides that the Commissioners of Inland Revenue shall not approve a contract unless it provides that no annuity payable under it shall be capable in whole or in part of surrender, commutation or assignment. The subsection then sets out five matters for which the contract must *not* provide, but subsection (3) gives the Commissioners power to approve the contract notwithstanding that it *does* provide for one or more of five further matters, subject to such further conditions as they impose.

Thus, through the complex process of these two subsections we reach the following position:—

1. The Commissioners are not *bound* to approve any contract and there is no provision for appeal against a decision not to do so.

2. They cannot approve a contract unless it provides that any annuity payable thereunder cannot in whole or in part be surrendered, commuted or assigned. Thus, the individual affecting the contract cannot use the money paid by him except in the form of an annuity, nor can he pledge it as security for a loan.

3. They cannot approve it unless it *does not*:—

(a) provide for any payment to the individual during his life of any sums except by way of annuity; or

(b) provide for the annuity to commence before age 60 or after age 70; or

(c) provide for the payment of any other sums except an annuity to the individual's widow or widower, or if no annuity becomes payable a return of premiums with reasonable interest or bonuses out of profits to the individual's personal representatives; or

(d) provide for a widow's or a widower's annuity of greater amount than that paid or payable to the individual; or

(e) provide for any annuity otherwise than for life.

Thus, apart from the provisions of subsection (3)—see below—no contract can be approved if the individual's annuity is to commence other than between age 60 and age 70 and it must be for life. The benefit (if any) on death must take the form of a widow's or widower's life annuity of an amount not exceeding the individual's annuity or a return of premiums with interest or bonuses.

4. The Commissioners *may*, subject to any conditions they think proper to impose, approve a contract notwithstanding that it *does* provide for one or more of the following:—

(a) for a death benefit which takes the form of an annuity to a dependant who is not the individual's widow or widower;

(b) an annuity to the individual commencing before age 60 on the grounds of incapacity to carry on his occupation or any similar occupation;

(c) an annuity to the individual commencing before age 60, but not before age 50, if such a retiring age is customary in his occupation;

(d) an annuity guaranteed payable for a minimum term of up to ten years whether the annuitant survives or not, or an annuity which terminates on marriage (or re-marriage) or in other circumstances;

(e) for the payments after the death of the annuitant of an annuity which is guaranteed for a term certain to be capable of being assigned by his personal representatives on his death.

It can be seen that (4) above enables a somewhat wider selection of benefits to be incorporated in an approved contract, but the Commissioners can impose such conditions as they think fit and there is no provision for appeal against their imposition. No information is yet available as to the type of conditions which are likely to be imposed.

Before entering into a contract with an individual, a life assurance company or the trustees of a scheme will require to be satisfied that the individual has "relevant earnings," *i.e.*, broadly speaking, non-pensionable earnings, and questions should be asked to this effect. The Inspector of Taxes will also require to be so satisfied, and it is understood that a special form is being printed for this purpose.

The approval of a contract may be withdrawn at any time by notice in writing from the Commissioners on such grounds and from such date as may be specified.

The following is an example of a contract which should be capable of being approved.

A enters into a contract supported by annual premiums of £150 which provides for an annuity of £500 to himself commencing at age 65 if he is then alive. The annuity will be payable for ten years certain and then for life. On his death at any time an annuity of £500 is to be paid to his widow if she is then alive, and this also will be payable for ten years certain and then for life. If A dies before age 65 and his wife has predeceased him a sum equal to the premiums paid, with interest at 4 per cent. per annum, would be payable to his legal personal representatives.

Trust Schemes

Section 22 (5) sets out the conditions which a trust scheme must fulfil before it can be approved by the Commissioners. It must be established:—

(a) under the law of any part of, and be administered in, the United Kingdom,

(b) for the benefit of individuals engaged in or connected with a particular occupation or group of occupations for the purpose of providing retirement annuities for them with or without benefits for dependants;

(c) under irrevocable trusts by a body comprising or representing a substantial proportion of the individuals so engaged in the United Kingdom, or in England, Wales, Scotland or Northern Ireland.

The subsection goes on to provide that the income arising from the investment of the contributions of such a trust scheme shall be exempt from income tax.

The effect of these provisions is that a trust scheme for this purpose can be set up only by a body such as a professional organisation, a trade association or a trade union. This is unfortunate, because there are many self-employed persons and controlling directors who would have preferred to have become members of their own staff pension schemes.

As far as the writers are aware, no trust schemes have yet been set up for this purpose, but it is known that some organisations have the matter under consideration. If an organisation decides against setting up a trust scheme it is denying to its members a choice which would otherwise be available. Some careful thought should therefore be given to this matter by the governing bodies of all eligible organisations.

What form would a trust scheme take? Clearly the contributions received from each member who joins must be recorded in a separate account. The money therein recorded will be represented by investments and these vary in value from time to time. Theoretically, each contribution could be used to buy a certain security, but in practice this would in most cases give rise to too many small holdings and even then any one member might be unlucky in his particular holdings. As in all matters of investment, a spread of securities is desirable and this can be achieved even with small amounts.

There is no need to put any limits on the powers of investment of such a trust scheme, and it is suggested that by far the simplest method of investing the contributions received from members would be to purchase units in a unit trust. As each contribution was received the member's account would be credited with the number of units which are bought with that contribution and this will, of course, depend on the price of the units on that day. As dividends are received from the Unit Trust (and subsequently income tax recoveries) these would be used to purchase further units which would be allocated to members' accounts in proportion to the units already held therein.

It is understood that a non-profit making Unit Trust is being set up with the sole purpose of receiving and investing money from pension trust funds approved for tax purposes, both employee funds and trust schemes set up under the Finance Act, 1956. It is likely that separate classes of units will be available according to whether the trustees of a fund require investment in gilt-edged (or other fixed interest securities) or in equity shares. In the case of

a trust scheme under the 1956 Act, each member could be asked to decide in which class his money was to be invested, or he could decide that a proportion was to be invested in one class and a proportion in another.

A Unit Trust established especially for the purpose of pension fund investment would purchase securities having a special appeal to a tax-free investor and to this extent should show better results than a Unit Trust open to all types of investors.

In this way an individual could, through a trust scheme, obtain investment under expert management which could be expected to provide some compensation in the event of continued inflation, and this is possibly one of the more important advantages which a trust scheme can offer as against a contract for fixed benefits effected with a life assurance company. Another important advantage of a trust scheme would be the fact that less of the contributions would be absorbed in expenses than in the case of a life assurance company.

A claim on a member's account can arise only on his death or his attaining the age chosen for the commencement of his annuity. If the benefit on death is payable in the form of a lump sum the whole value of the units held in the account would be paid out. If the benefit on death or on the attainment of the chosen age is an annuity then there are three methods of dealing with the money available:

(1) the whole can be paid to a life assurance company in return for a contract to pay an appropriate amount of annuity;

(2) part can be paid to a life assurance company in return for a contract to commence to pay the annuity in, say, ten years' time, it being paid in the meanwhile direct from the trust fund; or

(3) the annuity may be paid entirely from the trust fund.

Method (1) is essentially simple—the amount of the annuity is settled once and for all and its payment is guaranteed by the life assurance company. Method (2) and method (3), however, extend the chance of the pension keeping pace with inflation over a longer period. If either of these last two methods were adopted the money available would be pooled and that part of the trust fund would be run on actuarial principles.

Under such a scheme as is described above a member could pay whatever amount of contribution he liked whenever he liked without causing any disorganisation. Those administering the scheme are in no way concerned with the amount of qualifying premium which attracts relief in the individual's tax assessments. That is a matter entirely between him and his Inspector of Taxes.

Amount of Relief

No person can pay a qualifying premium or contribution unless he has relevant earnings. If he has, however, there is no limit on the amount he can pay. What is limited is the amount on which he can claim relief in any one year.

Section 23 (1) and the Third Schedule set the maximum on the amount of any qualifying premium or contribution ranking for relief, but subsections (2), (3) and (13) must also be considered because in some circumstances a payment in one year may in whole or part be capable of being treated for tax purposes as though paid in a different year.

In the main the limit in any one year is the lower figure obtained from the following table:—

Year of birth	Maximum amount	Maximum percentage of net relevant earnings
(1)	(2)	(3)
	£	%
1916 or later	750	10
1914 or 1915	825	11
1912 or 1913	900	12
1910 or 1911	975	13
1908 or 1909	1,050	14
1907 or earlier	1,125	15

Thus a person who does not come within the exceptions dealt with below, who was born in 1900 and who has net relevant earnings of £1,000 could obtain relief on £150. If his net relevant earnings were £8,000 he could obtain relief on £1,125 (not on £1,200, which is 15 per cent. of £8,000).

If a person has pensionable earnings as well as relevant earnings he can obtain relief on the appropriate percentage of his net relevant earnings provided that this does not exceed the amount in column (2) reduced by the appropriate percentage of his pensionable earnings, *e.g.*, a person born in 1920 has net relevant earnings of £8,000 and pensionable earnings of £500. The maximum amount on which he can obtain relief is £750 less 10 per cent. of £500, *i.e.*, £700.

The Third Schedule further provides that no matter what the date of birth, the limits shall be 10 per cent. and £750 if during any year of assessment the individual either (a) receives a pension in respect of past service (other than part-time service) or (b) has a right to a future pension in respect of past service (other than part-time service) under a sponsored superannuation scheme in

which his current service does not rank (usually termed a "frozen" pension).

If the whole of a qualifying premium or contribution cannot be allowed for relief in the year in which it is paid the balance over the appropriate percentage of net relevant earnings for that year (but not that over the appropriate amount in column (2) of the table —possibly adjusted as above) may be carried forward for relief and be allowed against current net relevant earnings in a later year, in accordance with section 23 (2).

If the individual pays a qualifying premium or contribution after the end of a year of assessment but within a period of six months beginning with the date on which an assessment for that year becomes final and binding, he may elect, within that period of six months, that that premium or contribution shall be treated as though paid within the year of assessment covered by that notice, but in arriving at the amount allowable the appropriate limits must be applied to that particular assessment.

Because of subsection (13) any qualifying premium or contribution paid in the year of assessment 1957–58 may be treated as though paid in the year 1956–57.

If any claimant is dissatisfied with the relief given under section 23, in respect of a qualifying premium or contribution, he has the right of appealing to either the General or the Special Commissioners. No Regulations have yet been made in accordance with section 28 governing the procedure on such appeals. A penalty provision, of £500, in section 28 (5), applies if a claimant knowingly makes a false statement for the purpose of obtaining tax relief.

II. Purchased Annuities, other than Retirement Annuities

Under section 27, Finance Act, 1956, a purchased life annuity, other than one which comes within subsection (8), is to be treated as containing a capital element. To this extent the annuity will be exempt from tax, with effect from the commencement of the year of assessment 1956–57, whenever the annuity is or was purchased. This amendment of the law is in accordance with the recommendation of the committee on the taxation treatment of provisions for retirement, referred to earlier (paragraph 503, and Summary, Cmd. 9063). However, this exemption of the capital proportion of each annuity payment is not restricted to annuities which are purchased in order to provide for retirement or old age, but is applicable to every purchased life annuity which is not excluded by reason of being within section 27 (8).

Turning, therefore, to this subsection, it will be seen that the excluded annuities fall under four heads (a) to (d). The first is that if, under the tax provisions apart from the Finance Act, 1956, an annuity would be treated as consisting to any extent of a capital sum, then no relief is due under section 27. This covers, for example, an annuity certain, which is already exempt from tax on other than the interest portion. Secondly, if the consideration or part, for the grant of an annuity qualifies for relief under section 23, Finance Act, 1956, or under sections 219 or 225, Income Tax Act, 1952, the annuity is excluded. It is considered, however, that this exclusion does not apply if the purchaser uses a sum of money which is under his own unfettered control notwithstanding that tax relief may have obtained in respect of life assurance premiums prior to the maturity of the sum assured. For example, it may be more beneficial to an individual who is not a surtax payer to continue any existing endowment policy in order to provide himself with a lump sum with which to purchase a life annuity.

The third head of excluded annuities comprises any annuity purchased in pursuance of a direction in a will, or to provide an annuity payable under a will or settlement out of income disposed of under such will or settlement, whether or not with power to resort to capital. Thus, if such an annuity is purchased, the whole of the annuity will be subject to deduction of tax at source, and tax will have to be accounted for thereon. Therefore, if an annuity is payable under a direction in a will or settlement, no tax can be saved by purchasing an annuity instead of paying it out of income. Even if the annuity is made up out of capital, the capital portion will still be subject to tax, under the decision in *Lindus and Hortin* v. *I. R. C.* (1933) 17 T.C. 442.

Fourthly, an annuity purchased under a "sponsored superannuation scheme" (defined in section 22, Finance Act, 1956) or any scheme approved under section 22 (5), *ibid.*, and also any annuity purchased in recognition of services in any employment, are excluded. The whole of such annuities will be assessable, normally as earned income.

Calculation of the Capital Element

The capital element of a purchased annuity depends, broadly speaking, on the proportion which the total consideration given for the grant of the annuity bears to the amount of the benefits for the period during which the annuity is expected to be payable according to the "prescribed tables." This is stated more precisely

in subsections (2) and (3) of section 27, but it is important to notice that the proportion remains constant for each payment of the annuity. This means that if the amount of the annuity is constant the same amount of each payment will be exempt from tax throughout the term, and the payee will have to bear tax on an amount which will remain the same throughout.

The "prescribed tables" referred to in section 27 (3) (c) have been laid down in regulation 6 of the Income Tax (Purchased Life Annuities) Regulations, 1956, as the "select" tables published for the Institute of Actuaries and the Faculty of Actuaries by the Cambridge University Press in 1953 and known as "The *a* (55) Tables for Annuitants."

The wording of section 27 in this connection is of necessity very complicated and the meaning is best illustrated by two straightforward examples, as follows:—

X, a male aged fifty-seven last birthday pays £1,200 for an immediate life annuity of £100. According to the prescribed table his expectation of life is 19·839 years. The capital element in each annuity payment is $\frac{1,200}{19·839}$ = £60 10s. and only £39 10s. will be treated as taxable income.

Y, a male aged fifty last birthday, entered into a contract twenty years ago for an annuity of £100 which is now due to commence. He has paid twenty premiums of £60 each. His expectation of life according to the prescribed tables is 25·632 years. The capital element in each annuity payment will be $\frac{60 \times 20}{25·632}$ = £46 16s. and £53 4s. will be treated as taxable income.

The above indicates the method of calculation in what will undoubtedly prove to be the vast majority of cases. Subsection 27 (2) (d), however, provides that where special circumstances apply the capital element shall be such as may be just having regard to the method which applies in normal cases.

Effect is given to the exemption of the capital portion of the annuity by a notice by the Inspector of Taxes, within section 27 (4). The detailed procedure is set out in the Income Tax (Purchased Life Annuities) Regulations, 1956 (S.I. 1956, No. 1230). Any claim must be made in writing to the Inspector by the payee, who must give the particulars required in the Schedule to the Regulations. These include the amount of each annuity payment, the frequency of the payments, and the name of the person or persons on whose life or lives the annuity depends. Further particulars may be required if the payer is not a person resident in the United Kingdom or is not a United Kingdom branch or agency. Such

particulars as are necessary to determine whether section 27 (8), relating to excluded annuities, applies must also be furnished. The Inspector is also entitled to ask for further details, such as the age of the person during whose life the annuity is payable, and the amount or value of the consideration given for the grant of the annuity.

The Inspector then has the task of determining whether the annuity is a purchased life annuity within section 27 (1), and if it is, the proportion of each payment which constitutes the capital element, in accordance with the prescribed tables. The payee has a right of appeal, within twenty-one days, to the Special Commissioners. The usual procedure relating to Schedule D appeals will be followed, and there is the same right of appeal from the Special Commissioners to the High Court by way of a stated case. If the appeal succeeds, the Inspector will issue a revised notice of determination upon the payer of the annuity. There is also power to make a revised determination at the instance of either the Inspector or the payee, if the original determination was erroneous.

The person paying the annuity is required to deduct tax only on the non-capital portion in accordance with the Inspector's notice, until any fresh notice is received. If the payer has not received a notice, he must treat the annuity as though it were not a purchased annuity entitled to any exemption and deduct tax in the usual way, *i.e.*, normally from the whole of each payment.

The same stringent penalty in section 28 (5), that of £500, applies if a person knowingly makes a false statement or false representation for the purpose of obtaining any relief or repayment of tax, on the ground that an annuity is a purchased life annuity.

CAPRICE IN THE LAW OF INTESTATE SUCCESSION

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If an intestate dies leaving no surviving relative nearer than issue of a deceased brother can such of the issue who attain full age or marry take the estate? Before the passing of the Intestates' Estates Act, 1952, no conveyancer would have hesitated to answer "Yes." But the drafting of the new Act suggests that now the answer may have to be "No," though it would still be "Yes as to one half share" if the intestate had also been survived by a sister who attained full age or married.

By virtue of the Intestates' Estates Act, 1952, sections 46 to 49 of the Administration of Estates Act, 1925, have effect as respects a person dying intestate after January 1, 1953, subject to the amendments set out in the First Schedule to the 1952 Act. Those amendments include the addition of two new subsections (subsections (4) and (5)) to section 47 of the 1925 Act. The present writer has recently had occasion to consider the meaning of the latter of those subsections and he has come to the conclusion that it has altered the law of intestate succession in a surprising and capricious manner. The point appears to be free of authority.

In order to explain the point it is necessary first to summarize the effect of section 46 (1) (v) and section 47 (1) and (3) of the 1925 Act. No material amendment has been made to any of these provisions by the 1952 Act.

By section 46 (1) (v) of the 1925 Act, as amended, it is enacted that, where an intestate leaves no spouse, issue or parent, the residuary estate is to be held "in trust for the following persons living at the death of the intestate, and in the following order. . . ." There are then set out five classes of relatives, namely: (1) brothers and sisters of the whole blood; (2) brothers and sisters of the half blood; (3) grandparents; (4) uncles and aunts of the whole blood; and (5) uncles and aunts of the half blood. No member of class (2) can take any interest if any member of class (1) takes an absolutely vested interest, and similarly in respect of the subsequent classes. Grandparents are in a somewhat special position and are irrelevant to the present argument, but in the case of the other four classes the residuary estate is in each case directed to be held "on the statutory trusts" for the members of the class.

By the combined effect of subsections (1) and (3) of section 47 where the residuary estate "is directed to be held on the statutory

trusts for any class of relatives of the intestate, other than issue of the intestate," it is to be held for all or any members or member of that class living at the death of the intestate, who attain full age or marry, and for all or any of the issue living at the death of the intestate, who attain full age or marry, of any member of that class who predeceases the intestate, such issue to take their deceased parent's share *per stirpes*.

Pausing there, the effect of sections 46 and 47 of the 1925 Act is that where, for example, an intestate dies leaving no spouse, issue, parent, brother or sister surviving, but leaving nephews and nieces by (say) a deceased brother of the whole blood, such of those nephews and nieces who attain full age or marry take the residuary estate equally between them to the entire exclusion of surviving brothers and sisters of the half blood and of all the subsequent classes mentioned in section 46 (1) (v).

That sections 46 and 47 had the effect mentioned in the example given in the case of an intestate dying before the commencement of the 1952 Act is uncontroversial. But it is submitted that, in the case of an intestate dying since the commencement of the 1952 Act, the new subsection (5) of section 47 has the effect of wholly precluding the nephews and nieces from taking any interest in the intestate's residuary estate.

So far as is material the new subsection (5) of section 47 of the 1925 Act reads as follows:—

> "It is hereby declared that, where the trusts in favour of any class of relatives of the intestate, other than issue of the intestate, fail by reason of no member of that class attaining an absolutely vested interest, the residuary estate . . . shall, by virtue of subsections (2) and (3) of this section, go, devolve, and be held under the provisions of this Part of this Act as if the intestate had died without leaving any member of that class, or issue of any member of that class, living at the death of the intestate."

It is submitted that the expression "any class of relatives" in the last quoted subsection can only refer to what may be called the "primary classes" specified in section 46, and does not include the issue who take in substitution for a deceased member of a primary class by virtue of section 47 (1) and (3). Where the identical expression "any class of relatives" occurs in section 47 (3), the context makes it self-evident that the reference is exclusively to the primary classes. The rule of construction that where the same words are used more than once in the same statute they are to be given the same meaning on each occasion that they occur is, it is

true, one which will readily be departed from where the context so requires; but the construction of the expression "any class of relatives" in subsection (5) as including issue who take in substitution for a deceased member of a primary class would render wholly meaningless the words "or issue of any member of that class" which occur towards the end of the subsection.

If it be conceded that the expression "any class of relatives" refers only to the primary classes there seems to be no escape from the conclusion that no person can take in substitution for a deceased member of a primary class unless at least one member of the same primary class survives the intestate and attains an absolutely vested interest. This conclusion, if correct, involves thoroughly capricious results.

Thus, in the example given above, the nephews and nieces will be wholly excluded, since the trusts in favour of the primary class through whom the nephews and nieces claim (*i.e.*, brothers and sisters) will have failed "by reason of no member of that class attaining an absolutely vested interest," and the whole residuary estate will go to the next primary class in existence at the death of the intestate. But if the facts were as stated in the example, save that the intestate died leaving a married sister, the sister would take one half of the residuary estate and such of the nephews and nieces who attained full age or married would take the other half. On the other hand, if the facts were as stated in the example, save that the intestate died leaving an unmarried infant sister, the destination of the residuary estate would remain in doubt until it was known whether the sister would attain full age or marry. If she did, then she would take half of the residuary estate and such of the nephews and nieces who attained full age or married would take the other half. But should the sister die an infant and a spinster the nephews and nieces would take nothing, and this irrespective of whether the nephews and nieces were themselves of full age or married at the death of the intestate, since the trusts in favour of the primary class would have failed "by reason of no member of that class attaining an absolutely vested interest."

It is thought that the example given sufficiently illustrates the point but, if the argument is sound, it necessarily follows that similar results occur where the primary class is any of those mentioned in section 46 (1) (v) of the 1925 Act, with the exception of grandparents.

An escape from the full absurdity of the construction of subsection (5) here contended for may be sought by saying that the trusts in favour of a given primary class do not "fail by reason of no member of that class attaining an absolutely vested interest"

unless some member of that class survives the intestate and thus acquires an interest contingent upon attaining full age or marrying. It is submitted that the words of sections 46 and 47 afford no support for such a construction but, assuming that it were the correct one, it would not meet the case mentioned above of an unmarried infant of the primary class surviving the intestate but dying before attaining an absolutely vested interest.

If the construction of subsection (5) here contended for is correct early amending legislation would seem to be called for.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Fairey v. *Southampton County Council* [1956] 3 W.L.R. 354; [1956] 2 All E.R. 843 (C.A.)

Public right of way—user for over 20 years brought into question —retrospective effect of statute—Rights of Way Act, 1932.—In this case the Divisional Court (whose decision was noted *ante,* p. 163) held that the Rights of Way Act, 1932, was substantially procedural and therefore retrospective in effect. Consequently a public right of way enjoyed from 1885 to 1931, and thereafter interrupted, was validated by the Act. The Court of Appeal (Denning, Birkett and Parker L.JJ.) has now affirmed the decision of the Divisional Court but disagreed with its reasoning. The Court of Appeal, following *Cooper* v. *Hubbuck* (1862) 12 C.B.(n.s.) 456—a decision on the Prescription Act, 1832, not cited in the court below—held the Rights of Way Act, 1932, not to be primarily procedural and therefore not prima facie retrospective; the court further held, however, as a matter of construction, that the Act was intended to be retrospective. Consequently the right of way stood.

Denning L.J. in his judgment, discussed the sort of act necessary to constitute an interruption or to "bring into question" such a right (Rights of Way Act, 1932, s. 1 (1) (6)). He said that the landowner must show persons concerned to assert the right that it was being challenged; it would not be enough to turn back only strangers, unless local residents were thereby made to realise that the existence of a public right was disputed. It seems that this is really a question of the valuation of evidence. A landowner who allowed villagers to pass over his land by licence but kept off passing motorists would not, it is submitted, be thereby deemed to dedicate. Where, however, interruption of established use by the public generally is in question, as in the instant case, stronger evidence is required.

Leave to appeal to the House of Lords was granted.

Re Barr's Contract. Moorwell Buildings, Ltd. v. *Barr and Another* [1956] 1 W.L.R. 918; [1956] 2 All E.R. 853 (Ch.D.)

Sale of land—contract—notice purporting to make time of the essence—whether reasonable.—The general rule is that time is not of the essence of a contract for the sale of land. (Law of Property

Act, 1925, s. 41; *Stickney* v. *Keeble* [1925] A.C. 386; unless special circumstances make it so, *e.g.*, sale of licensed premises: *Lock* v. *Bell* [1931] 1 Ch. 35). Therefore in the normal case where a date for completion is stated the purchaser can complete then or within a reasonable time thereafter. Conditions entitling the vendor to forfeit the deposit and resell must be read subject to this general rule (*Smith* v. *Hamilton* [1951] Ch. 174). In the present case Danckwerts J. said that a vendor cannot normally make time of the essence unless he himself is able, ready and willing to complete, the purchaser is in such default that the vendor can rescind by reasonable notice, and the time given by the notice requiring completion is reasonable ([1956] 1 W.L.R. at p. 922; [1956] 2 All E.R. at p. 856). Here, however, Condition 23 (i) of the 16th edition of the National Conditions of Sale was incorporated into the contract. This provides that at any time on or after the completion date the vendor, being able, ready and willing to complete, may give to the purchaser "notice in writing requiring the purchaser to complete within such period (not being less than 28 days) as the notice shall prescribe." The contract signed on January 19, 1956, stated January 31, 1956, as the date for completion. The purchase price was £50,000.

Negotiations had been going on for some time, and indeed the vendors were also acting as the purchaser's agents in trying to arrange a sub-sale. These latter negotiations broke down suddenly between January 19 and 31, and on February 1 the vendors served on the purchasers a notice requiring completion in 28 days.

Danckwerts J. held that, even if Condition 23 (i) above obviated the need for a case for rescission to have arisen, still the notice given must be reasonable, and on the facts the minimum period of twenty-eight days was not appropriate. The learned judge held that the practical problem of raising money must be considered as well as conveyancing matters, and here the special circumstances relating to the sub-sale were very relevant.

General Condition 36 of the Law Society's Conditions of Sale, 1953, is in similar terms to the National Condition considered here, and it would seem that the decision would be equally applicable. The result would seem to be that reasonable time to complete must always be given, however apparently stringent the conditions of sale.

Peter Long & Partners v. *Burns* [1956] 1 W.L.R. 1083; [1956] 3 All E.R. 207 (C.A.)

Estate agent—commission payable on "binding contract"—innocent misrepresentation — rescission of contract — whether commission chargeable.—The Court of Appeal (Singleton, Morris and Romer L.JJ.) has affirmed the decision of Lord Goddard C.J. (noted *ante*, p. 240). Commission payable on the signing of a "binding contract" cannot be claimed if the contract is voidable for innocent misrepresentation, for in this context "binding" is equivalent to "specifically enforceable." The judgments of the Court of Appeal also contain some general discussion of the duties of estate agents.

Re Ingleton Charity. Croft and Others v. *Att.-Gen.*
[1956] 3 W.L.R. 369; [1956] 2 All E.R. 881 (C.A.)

Charity—school site—reverter—continued possession by vicar and churchwardens—possessory title—trusts of land and proceeds of sale —School Sites Act, 1841, *ss.* 2, 7; *Endowed Schools Act,* 1869, *s.* 5.—Land conveyed in fee simple to be used as a school under the School Sites Act, 1841, s. 2, is subject to statutory reverter to the grantor if it ceases to be used for that purpose. Such a fee simple, though liable to determination, nevertheless subsists as a legal estate after 1925 (Law of Property Act, 1925, s. 7 (1)). Moreover, land so conveyed to a vicar and churchwardens will vest in the holders of these offices for the time being, though they do not normally constitute a corporation (School Sites Act, 1841, s. 7). The title of a vicar and churchwardens (or other grantees) therefore determines when the land ceases to be used for a school and the court will so declare if requested. (*Dennis* v. *Malcolm* [1934] Ch. 244; *Re Cawston's Conveyance* [1940] Ch. 27.) However, if nothing is done the vicar and churchwardens continue to hold the land as adverse possessors and time runs in their favour under (now) the Limitation Act, 1939.

In the present case the school, on land conveyed under the School Sites Act, 1841, ss. 2, 7, in 1846, was closed in 1929. The vicar and churchwardens, having continued in possession, sold the land in 1952 and executed a declaration of trust that they held the proceeds for the purposes of the parish. The Minister of Education, however, contended that the property was at all times held on the trusts of the original conveyance, and so was an educational endowment for which a scheme could be made (Endowed Schools Act, 1869, as amended by Education (Miscellaneous Provisions) Act, 1948).

Danckwerts J. dealt with the case "on the assumption that the right of reverter operated on December 20, 1929, but that the title of the Lord of the Manor's successors was ousted by the possession for the statutory period and longer by the vicar and churchwardens." He then held, following *Churcher* v. *Martin* (1889) 42 Ch.D. 312 and *Att.-Gen.* v. *Price* [1912] 1 Ch. 667, that the land and proceeds of sale were at all times held on the original trusts unless and until varied by a scheme settled by the court or the Minister of Education. Consequently the title of the purchasers in 1952 was defective, for the vendors had not obtained the necessary consent from the Minister of Education, who exercises in relation to educational charities the powers of the Charity Commissioners.

2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Ropner's Settlement Trusts [1956] 1 W.L.R. 902;
[1956] 3 All E.R. 332n (Ch.D.)

Trust—variation—power of advancement—advanced portions to be settled—purpose of avoidance of estate duty.—Trustees of four voluntary settlements and of a will asked whether they could properly

exercise express and statutory powers of advancement in favour of two adults and one infant beneficiary. The proposal was to pay the sums so advanced to trustees of settlements to be executed by the adults, and by the infant's father on his behalf. One of the principal objects of the advancement was the saving of estate duty if the life-tenant aged 58 (the father of the beneficiaries) lived for a further five years. Harman J. held following *Re Vestey's Settlement* [1951] Ch. 209 (and see *Roper Curzon* v. *Roper Curzon* (1871) L.R. 11 Eq. 452) that such a transaction must be considered to be for the benefit of the infant provided the terms of the proposed settlements were beneficial. These terms were to be determined by the trustees, who did not surrender their discretion in the matter to the court.

This decision therefore provides yet another means whereby the terms of an existing settlement may be varied so as to reduce the incidence of taxation.

Re Wale (deceased) [1956] 3 All E.R. 280 (Ch.D.)

Incompletely constituted trust—equitable assignment—legal interest not transferred—perfecting of imperfect gift.—The facts in this case might have been artificially constructed to provide an exercise in the application of well-known equitable principles. A voluntary settlement recited that the settlor had transferred certain named investments to her two sons as trustees, and went on to declare trusts in favour of the settlor, her daughter and the latter's issue. Though the settlor was beneficially entitled to all the investments, some, called the "A" investments, stood in her name alone but others, called the "B" investments, in her name and those of her sons as personal representatives. In 1953 the settlor died, having by her last will of 1950 appointed her sons and daughter as executors and trustees and having divided her property equally among them. Between 1939 and 1950 the settlor had made other wills on similar lines and had had some dealings with both "A" and "B" investments, without any express reference to the voluntary settlement.

A voluntary trust must be completely constituted to be effective, either by a transfer of the trust property to the trustees, or by a declaration of trust by the legal owner (*Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11), but the court will not construe an imperfect gift as a declaration of trust (*Milroy* v. *Lord* (1862) 4 De G.F & J. 264). Moreover, an equitable assignment can take any form, including a direction to the legal owner to hold the property on fresh trusts (*Re Chrimes* [1917] 1 Ch. 30). Applying these principles, Upjohn J. held that the settlor's expression of intention was sufficient to transfer her equitable interest in the "B" investments, which therefore became subject to the settlement. The misrecital (that the transfer had been made) did not affect the deed since the intention was clear (Norton on *Deeds*, 2nd ed., at p. 210). The "A" investments were not affected at the date of the settlement.

The second question was whether the "A" investments were caught by the settlement on the settlor's death under the principle of *Strong*

v. *Bird* (1874) L.R. 18 Eq. 315, which says that an imperfect gift of personal estate may be perfected when the donee becomes the donor's executor, if the intention remains unchanged. After reviewing the evidence, Upjohn J. concluded that the settlor-testatrix had always intended an equal division among her children, and had forgotten the voluntary settlement, which had originally been intended to protect the daughter's property from her husband, by whom she had since been divorced for desertion. Consequently the rule in *Strong* v. *Bird* was inapplicable.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Vernon v. *I. R. C.* [1956] 1 W.L.R. 1169;
[1956] 3 All E.R. 14 (esp. 20 *et seq.*). Upjohn J.

Limited effect of Charitable Trusts Validation Act, 1954.—Piecemeal legislation is notoriously unsatisfactory. As a result of the *Diplock* line of cases the legislature wished to validate gifts made in the alternative to charitable *or* other purposes. The statute translated the concrete problem of draftsmanship into an abstract proposition; it validates clauses under which property *could* be used for purely charitable purposes but *could* also be used for other purposes. Not unnaturally, claimants must have seen in this a wide loophole for the validation of any trust for purposes some of which are charitable, *e.g.*, a direct gift for benevolent purposes obviously could be devoted to purely charitable purposes. The court is clearly determined to limit the statute to its intended sphere. In the present case, ignoring certain procedural complications about compromises and schemes, the trust was for the provision of a club house and recreation grounds for the employees of a given firm. Members of the public might be invited in, with certain consents, but were not the primary objects of bounty. Upjohn J. held that this was not a valid charity, though it was possible to salvage the situation because the court had jurisdiction to approve a new and valid scheme. Reliance was placed on the decision of the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 297. Their Lordships in that case largely based their decision on approval of *Re Drummond* [1914] 2 Ch. 90. *Re Drummond* was a closely analogous case, the payment of holiday expenses of employees of a business, and more helpful than *Oppenheim's* case itself. In none of these cases was there any serious argument that relief of poverty entered into it—it was a question whether the trust was public or private in nature. The learned judge in the present case therefore had no difficulty in holding that the 1954 Act did not apply, since the funds in this case could hardly have been devoted exclusively to any charitable purpose, *e.g.*, to admitting poor members of the public and totally excluding employees of the firm. The future will no doubt

produce much finer points on the scope of the Act of 1954, and I dare predict that it will cause as much litigation as the rule about construing "or" disjunctively.

(Theobald 337, 339, 347)

Re Cooper's Conveyance Trusts [1956] 1 W.L.R. 1096; [1956] 3 All E.R. 28

Failure of charity—gift over—construction of gift over—resulting trust.—The main point in this case before Upjohn J. is a general rule of construction. If a gift over by way of defeasance or executory devise is invalid, the initial gift becomes absolute; if the gift over is by way of remainder there is a lapse of the remainder. In this case it was held that the gift to a charity (an orphanage) in 1864 lapsed in 1954 when it closed, that the gift over provided for in such an event was void for perpetuity, and that there was therefore a resulting trust for the donor's estate. The interesting point from the charity's point of view is that the provision of a gift over showed that the donor had no general charitable intention. Once the orphanage had closed there was therefore no place for the *cy-près* doctrine.

(Theobald 349, *cf.* 510)

Re Songest [1956] 1 W.L.R. 897; [1956] 2 All E.R. 765

Charitable bequest—ambiguity—equality is equity.—The actual fate of the bequest in this case has been altered since the report was prepared. It now appears from *The Times* that there was a single organisation intended by the testatrix and they have been to court and established their sole claim. However, the principle referred to in the case as reported still holds good, that if a gift is made to a purported charitable organisation, and its description might equally fit two different bodies, the fund is divided equally between them. The principle is rough and ready but not very logical; it might seem that a better plan would be a *cy-près* application. Perhaps in practice the *cy-près* application would come to the same thing, so time and expense are saved. The Court of Appeal have tried to justify their decision on the basis that the testatrix may have merged two different bodies in her own mind, without realising they were different; a gift to "The Temple" was given as an illustration. This is a mere surmise, and has been overtaken by events: it turns out that the testatrix had no intention of benefiting either of the two organisations. The whole idea is unsafe. Why not have four or five "near" organisations claim also? How can one decide which bodies are nearest to what was intended? The court must cut the knot arbitrarily at some point and this is not the work of a court of law. A scheme is better, as it may

be altered as new facts come to light, and it does not pretend to decide a precise point of construction.

(Theobald 356)

Re Ulverston and District New Hospital Building Trusts
[1956] 3 W.L.R. 559; [1956] 3 All E.R. 164

Complete failure of objects of intended charity—resulting trust.—The Court of Appeal have thrown the whole subject of abortive charities into some confusion by their decisions in *Re Hillier* [1954] 2 All E.R. 59, and the instant case. In *Re Hillier* the fact that some of the subscribers were anonymous and casual was treated as strong evidence for a general charitable intention, allowing *cy-près* application of the funds. In *Re Ulverston* the existence of anonymous contributions was treated as inconclusive, and severable from the legal position of known subscribers. All that is now left of *Re Hillier* appears to be its facts, in particular the noble reluctance of contributors in that case to ask for their money back. If a subscriber can prove that he contributed a particular sum, whether by a signed cheque or by correspondence, or even by parol evidence that he dropped a "fiver" into a collecting box to the knowledge of the collector, he is entitled to his money back if the object of the charitable collection is wholly frustrated. Lord Evershed, who was a member of the court on each occasion, seems to go quite as far as Jenkins L.J. on this. The court did, however, refer to several interesting legal principles. They considered the donor in a very strong position where the charity had never got going at all, and perhaps in a weaker position where it had failed after it had been in existence, or where it continued to exist but there was a surplus over its requirements. *Re Hillier* was also distinguished on the ground that there the object was to provide hospital facilities in a city where none existed, and this might be done by other hospitals, *e.g.*, a State hospital, whereas in *Re Ulverston* the object was to rebuild an existing hospital and the funds collected (£32,000 between 1927–1942) were inadequate. No claim was made by the local Hospital Management Committee for the National Health Service, but the Attorney-General of the Duchy of Lancaster argued that the funds could be applied *cy-près*. The plaintiffs had in fact made a substantial contribution and their desire to recover the money seems reasonable. They were a co-operative society with a responsibility to their members and may have felt that the State should undertake to provide a hospital, in accordance with Labour Party policy.

(Theobald 357)

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4. *PLANNING CASES*

By T. A. BLANCO WHITE, Barrister-at-Law

West Suffolk C.C. v. *W. Rought, Ltd.* [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216

Compulsory purchase—compensation for disturbance—tax.—This was an appeal to the House of Lords from a decision of the Court of Appeal (see (1955) 19 *Conveyancer* 314) holding that, in computing the sum payable on a compulsory acquisition for temporary disturbance of a business carried on in the premises acquired, questions of tax should not be considered. The House disagreed, holding (following the famous *Gourley* case [1956] A.C. 185) that since the item concerned involved computing the amount of profit lost through the disturbance, allowance must be made for the tax that would have been payable on those profits if earned. The Court of Appeal had based its decision upon a different line of authority, to the effect that the proper measure of compensation for compulsory purchase is the capital value of the property acquired, regardless of any question of how much of that value the recipient is allowed to retain. The House distinguished that other line of authority, expressly leaving open the question whether it is correct since *Gourley*. The Court of Appeal's mistake, it seems, lay in supposing that because the compensation for disturbance was to be added on to the value of the land, the same considerations applied to both sums.

Davis v. *Miller* [1956] 1 W.L.R. 1013; [1956] 3 All E.R. 109

Planning control—enforcement notice—pending appeal.—In this case, the Divisional Court held that an enforcement notice could validly be served, for breach of a condition in a planning permission, notwithstanding that an appeal to the Minister against the condition is pending. Lest it be supposed that this was necessarily a case of gross oppression by the local planning authority, it should be explained that the condition was a condition limiting the planning permission to one year; that the hearing of the appeal was postponed at the occupier's request until well after the end of that year; and that although an enforcement notice was served while the appeal was still pending, there was no prosecution for failure to comply with the notice until a long time after the appeal had been dismissed.

East Riding C.C. v. *Park Estate (Bridlington)* [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669

Planning control—enforcement notice—jurisdiction to quash.—This was the case of the enforcement notice, served in respect of development alleged to infringe previous planning control, which

merely stated generally that it alleged contravention of "planning control," coupling this with extracts from sections 23 and 24 of the Town and Country Planning Act, 1947, but not mentioning section 75 (which is the section concerned with contraventions of previous planning control). The occupiers of the land having appealed against the notice (as distinct from alleging its invalidity in a prosecution under it), the question then arose, not so much whether the notice was good or bad, as whether the invalidity came within the very limited jurisdiction to quash the notice given by section 23. The courts below had managed (see (1955) 19 *Conveyancer* 313) to hold that it did so come and should be quashed. So, by a bare majority, did the House of Lords in the present appeal. Of more permanent importance (since "previous planning control" now has little more than historical interest) are the observations of the House to the effect that vague enforcement notices are invalid, although this invalidiy is not of a sort that allows the notice to be quashed on appeal under section 23. It is of interest that a strong minority of the House was prepared to uphold the decision that the notice should be quashed on the ground that, whether there was jurisdiction to quash it or not, the notice was bad and what did it matter? Outside the House, of course, it does matter, since the right to have the notice quashed and the right to challenge it in defence to a subsequent prosecution are, in relation to any particular ground of objection to the notice, mutually exclusive.

Postill v. *East Riding C.C.* [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685

Planning control—enforcement notice—recurrent contraventions of control.—In this case, a field had been used, for a short period in the summer of each year, as a site for a travelling circus. On one occasion, permission for the use had been secured, on condition that the use was discontinued at the end of the summer. On a subsequent occasion, no permission was secured, and an enforcement notice was served alleging breach of the condition. The Divisional Court held that the notice should be quashed. There had been no breach of the condition, for the old use had been discontinued; this was a new use.

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5. *LANDLORD AND TENANT CASES*

By Donald Keating, b.a., Barrister-at-Law

Reohorn and Another v. *Barry Corporation* [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742, C.A.

Landlord and Tenant Act, 1954*—application for new lease—landlord's intention to reconstruct—landlord must show ability to*

reconstruct.—Section 30 (1) (f) of the Landlord and Tenant Act, 1954, is accumulating a body of important case law. *Fisher* v. *Taylors Furnishing Stores, Ltd.* [1956] 2 W.L.R. 985; [1956] 2 All E.R. 78 is the leading case which states in general terms the quality and nature of the intention to reconstruct, etc., required to be proved if the landlord is to make out his objection. The present case adds an important rider to that statement of principle and further, with the *Fleet Electrics* case (noted below), provides an indispensable guide to the kind of evidence which is necessary to prove the landlord's intention, especially where the landlord is a corporation.

The tenant used land on Barry Island as a car park. The landlords resisted the application for a new tenancy on the grounds that they intended to demolish and reconstruct. They produced resolutions on a proposed comprehensive scheme for development of the land with shops, hotels, boarding houses and a garage with car parking accommodation, and submitted an outline plan which showed an extensive scheme estimated to cost £500,000. They also produced an approved scheme for building a new road on Barry Island and a letter from a development company stating that the company was agreed "in principle" to start work on the scheme in June, 1956, "subject to the approval of the council and the conclusion of satisfactory arrangements." A new company was to be formed to take a building lease of the land. The county court judge found that the landlords had proved a genuine intention and refused the application for a new tenancy.

The tenant appealed, and the Court of Appeal allowed the appeal. It said that in applying the *Fisher* v. *Taylors Furnishing Stores* test —has the landlord a firm and settled intention to reconstruct—the court must consider the means and ability of the landlord. As Lord Justice Denning put it, "'Intention' connotes an ability to carry it into effect. A man cannot properly be said to 'intend' to do a work of reconstruction when he has not got the means to carry it out. He may *hope* to do so; he will not have the *intention* to do so." In the present case the landlords could only secure the carrying out of the work of reconstruction by means of a building lease, but its terms were not settled, neither was there any evidence of the financial ability of the proposed new company to finance this very expensive project. Difficulties might well arise which would lead to the abandonment or indefinite suspension of the scheme. The whole matter was still tentative, provisional and exploratory and had not yet reached "the valley of decision" (applying the words of Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. 237, 254).

There were two subsidiary points of some interest. The first was the date at which the intention should be considered. Denning L.J. was of the view that the correct date was the date of hearing. Parker L.J. reserved his opinion on the point (*cf. Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* [1956] 1 W.L.R. 678; [1956] 2 All E.R. 497, where Danckwerts J. held that the relevant time was the date of service of notice of opposition). The second point was the term of the tenancy granted by the Court of Appeal to the tenant. The land was ripe for development and the tenant had stated in effect that if he was satisfied that the landlords really intended to develop

immediately they could have the land at once. In these circumstances the tenancy granted was for a term of eight months only until December 31, 1956, and thereafter until determined by six months' notice to be given by either party to expire at any time on or after December 31, 1956.

Fleet Electrics, Ltd. v. *Jacey Investments, Ltd.*; *Wills* v. *Jacey Investments, Ltd.* [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99, C.A.

Landlord and Tenant Act, 1954—*application for new lease—proof of landlord's intention to reconstruct.*—In these cases, which were heard together, the Court of Appeal upheld the grant of new tenancies and held that there was evidence on which the county court judge could find that the landlord had not proved an intention to reconstruct. Lord Evershed M.R., with whose judgment the other members of the court agreed, said that the matter was one of fact, but his judgment seems to be authority for the following points of law:—

(i) Where the landlord is a limited company an objection cannot be sustained that no evidence is admissible of the company's intention other than that shown in the company's minutes. The directors can give evidence of intention.

(ii) If a landlord forms a definite intention to reconstruct it is not necessary that he should have a specific tenant in mind, but if he has a tenant in mind evidence of the financial position of that tenant and of his attitude of mind towards the proposed tenancy is admissible.

(iii) The length of term to be granted to the tenant is pre-eminently a matter for the discretion of the judge hearing the application and the Court of Appeal will not normally interfere with the term granted. By inference it seems to have been suggested that if there were special facts relevant to the length of term the Court of Appeal might interfere in a proper case.

Further Lord Evershed M.R. referred to the vexed problem of the relevant date for considering intention. He said (apparently *obiter*) that intention must be proved to have existed at the date of the notice of opposition and to have continued up to the date of hearing (*cf. Reohorn's* case, *supra,* and reference therein to *Betty's Cafés* case). Therefore evidence of what happened between the date of the notice and the date of hearing is relevant and admissible.

Matthew James McKenna v. *Porter Motors, Ltd.*
[1956] 3 W.L.R. 658; [1956] 3 All E.R. 262, P.C.

New Zealand Tenancy Act, No. 76 *of* 1948—*landlord's grounds for obtaining possession—relevance to English law.*—Section 24 of the Tenancy Act, 1948, of New Zealand, as amended, provided *inter alia* the following grounds for obtaining possession: "(h) . . . that the premises are reasonably required by the landlord . . . for his . . . own occupation . . . (m) That the premises are reasonably required by

the landlord for demolition or reconstruction." The Privy Council held that a landlord could succeed under paragraph (h) even though he intended to make substantial alterations or put up a wholly new building. It was not necessary for him to rely on paragraph (m), which was limited by paragraph (h) to cases where the landlord required the premises for demolition or reconstruction with a view to letting or selling them or making some use of them other than for his own occupation.

The wording of this New Zealand Act differs from the English Landlord and Tenant Act, 1954, Part II. Nevertheless there is a similarity between some of the grounds upon which a landlord can obtain possession under the New Zealand Act, and the grounds upon which a landlord can oppose an application for a new tenancy under the English Act, so that in some circumstances this decision may have considerable persuasive force. Consider the following: a landlord in his notice of opposition under section 25 of the Landlord and Tenant Act, 1954, states that he will oppose an application for a new tenancy on the grounds set out in paragraph (g) of section 30, *i.e.*, that he intends to occupy. Between the date of service of his section 25 notice and the date of hearing he decides that he will rebuild before occupying, and the objection is taken that his real ground of opposition is that he intends to demolish or reconstruct, *i.e.*, paragraph (f) of section 30, but that he cannot rely on the intention because it was not stated in his section 25 notice. This case would be relevant.

A similar problem might arise under the English Rent Acts where a landlord seeks possession under the 1933 Act, 1st Schedule, paragraph (h), *i.e.*, that he requires possession for his own occupation, but it appears that he wishes to rebuild before occupying. Again this case might be of assistance.

Higgins v. *Silverston* [1956] 3 W.L.R. 448; [1956] 2 All E.R. 893

Housing Repairs and Rents Act, 1954, *s.* 35 (1)—*whether work to flat took it out of the Rent Acts.*—This is the first case in which the Court of Appeal has considered section 35 (1) of the Housing Repairs and Rents Act, 1954. This exempts from the Rent Acts premises erected after August 30, 1954, and further exempts " separate and self-contained premises produced by conversion [after August 30, 1954] of other premises."

Before 1955 the owner of a house lived on the ground floor and let off the first and second floors. He shared the bathroom and lavatory on the first floor with the tenant on the first floor. In 1955 he sold the house, and the new owner did extensive work to the ground floor. He divided the bedroom by putting in a partition and made one part into a new lavatory and bathroom. He put in some new floors and fireplaces. He inserted interconnecting doors between the rooms and he created an entrance lobby by putting a door across the passage. The result was that the flat was " separate and self-contained," but it was held that the premises were not taken out of the control of the

Rent Acts. The flat was not produced by conversion of "other premises" but was merely an improvement of the same premises. There had been no "change of identity" within the meaning of Rent Act cases such as *Langford Property Co., Ltd.* v. *Batten* [1951] A.C. 223.

Examples were given of what would be conversions of "other premises." The first was a coach-house which by much work was turned into a dwelling-house with all the necessaries of life. The second was of a house, previously capable of being used only for one family, turned, by substantial structural alterations, into two separate and self-contained flats with all the necessaries of life in each.

Zbytniewski v. *Broughton* [1956] 3 W.L.R. 630; [1956] 3 All E.R. 348, C.A.

Rent Acts—claim for possession—tenant guilty of offence of overcrowding when proceedings began—not guilty of offence at date of hearing—whether landlord entitled to possession.—A tenant lived in rent-controlled premises in such circumstances as to render him guilty of the offence of overcrowding. The landlord thereupon brought proceedings relying on section 65 (1) of the Housing Act, 1936, which provides that in such circumstances "nothing in the Rent . . . Acts . . . shall prevent the landlord from obtaining possession of the house." After the date of issue of proceedings but before the date of hearing the tenant applied to the local authority for suitable alternative accommodation and thus, by virtue of section 59 (3) of the Housing Act, 1936, he was no longer guilty of an offence.

The short question was whether the respective positions of the parties were crystallized at the time of issue of proceedings so that the landlord was entitled to possession, or whether the subsequent application for alternative possession could be taken into account so that the Rent Acts applied in the ordinary way and the landlord was not entitled to possession without proof of one of the usual grounds. This was resolved in favour of the tenant. The Court of Appeal distinguished the general rule that the material date for determining whether the landlord's claim is well founded is the date of issue of proceedings. It is interesting to note that this case is consistent with the tendency of recent Landlord and Tenant Act, 1954, cases to admit evidence of events occurring after the commencement of proceedings.

R. v. *Tottenham and District Rent Tribunal, ex p. Northfield (Highgate), Ltd.* [1956] 3 W.L.R. 462; [1956] 2 All E.R. 863, D.C.

Furnished Houses (Rent Control) Act, 1946—*whether assignee can refer contract to rent tribunal.*—The Divisional Court has decided that the assignee of a lease is not a "party to the contract" within section 2 (1) of the 1946 Act and cannot, therefore, refer the lease under which he holds to the rent tribunal.

6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports, it is cited from *Taxation Reports* (T.R.).)

Beach v. *Reed Corrugated Cases, Ltd.* [1956] 1 W.L.R. 807; [1956] 2 All E.R. 652; [1956] T.R. 215 (Q.B.D.)

Income Tax and Surtax—Breach of contract—Damages

Point: Since the House of Lords decided in *British Transport Commission* v. *Gourley* [1956] 2 W.L.R. 41 that, in assessing damages for tort where the loss suffered is an income loss, the burden of tax and surtax that would have fallen on the income if received is an element reducing the sum to be awarded, there has been some fear that this rule would cause hardship. The incidence of income tax and surtax in the future depends upon many unascertainable factors, the future rates, the taxpayer's future income, the liabilities deductible against that income and the general future circumstances of the individual, and to calculate the tax liability on the present conditions would reach an unrealistic result. The courts are, however, used to making "inspired guesses" at damages for, as Lord Jowitt said in *Gourley's* case itself ([1956] 2 W.L.R. at p. 48): "It is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured."

In the present case Mr. Justice Pilcher was faced with the breach of the service agreement of a wealthy managing director. He heard and took note of the possibility of the director reducing his tax liability in the future, as he had done to a moderate extent in the past, by the use of "seven year covenants" and settlements of capital for his family. He said (1 W.L.R. at p. 814): "It is common knowledge that, with the present high incidence of taxation on income, those who are fortunate enough to enjoy a large income which is primarily unearned can legitimately and do, in fact, reduce their taxable income substantially by covenanting, sometimes for life, and sometimes for a period in excess of six years, large yearly sums to relatives and sometimes to old friends. . . . Similarly it is common knowledge that men of the plaintiff's age with large disposable investments are more prone, owing to high death duties, to transfer during their life capital sums to their children or dependants which, in the past, they would have disposed of by will. It would not, perhaps, be too much to say that the plaintiff seems to have acted in the past and intends to act in the future in the fashion which might be expected of a prudent man of affairs of his age possessed of his fortune. He is ordering, and I am satisfied he intends to order, his affairs along the lines he indicated." Following the *obiter dicta* of Lord Goddard in *Gourley's* case the learned judge then paid: "less, perhaps little, regard" to "disposable investments which might be sold at any time or transferred to a child."

The result therefore appears to be that, although the principle of taking tax into account when assessing damages extends to contract claims as well as those in tort, the existence of a private fortune is to be regarded as of little weight compared to the income the loss of which is in issue.

Facts and Decision: The defendant company wrongfully terminated the plaintiff's service agreement under which he was engaged by them as managing director for fifteen years at £5,000 per annum. Liability was admitted. The gross loss suffered by the plaintiff was £43,000, but owing to his large private fortune, at present rates of tax his net loss, had his income remained reasonably steady, would have been little over £4,500. The plaintiff gave evidence, which was accepted, that he intended parting with capital in favour of his children and entering into further covenants to pay income to others.

Held: The reasonable sum to award the plaintiff as general damages was £18,000. No further sum could be given by reason of the loss of expectation of benefit under a pension scheme, for the company had paid out to the plaintiff what was due to him in accordance with the rules and was not bound to do more.

C. I. R. v. *Countess of Kenmare* [1956] 3 W.L.R. 527; [1956] 3 All E.R. 69; [1956] T.R. 251 (C.A.)

Surtax—Settlement—Power of revocation

Statutory provisions: Finance Act, 1938, ss. 38 (2) and (7), 41 (4), Sched. III (now Income Tax Act, 1952, ss. 404 (2), 406, 410 and 411).

Point: This case, the first instance decision in which was noted in Vol. 19, p. 321, where the facts are set out, concerned a settlement made abroad by a non-resident, governed by foreign law, having non-resident trustees but a trust fund invested in the United Kingdom. Under a power contained in the settlement capital could be appointed to the settlor absolutely but not more than £60,000 in any period of three years. Having regard to the size of the fund and the age of the settlor it was very unlikely although possible that the fund would all be appointed to her under the power.

The Court of Appeal unanimously confirmed the judgment of Mr. Justice Danckwerts that the income should be treated as that of the settlor as the trustees had power to "revoke or otherwise determine the settlement or any provision thereof" and in that event the settlor would become entitled to the property comprised in the settlement, within Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404 (2)). The court were unanimous in holding that the foreign element did not oust the wide words of the section and the fact that the tax exacted from her might prove to be irrecoverable from non-resident trustees did not affect her legal right to so recover it. ". . . the legislature does not purport to ensure that such right of recourse would in all cases prove effectively available." Once applicable to the settlement the section was satisfied in that by taking

out the whole of the capital a "provision" of the settlement, whether that word means a clause or term of the written instrument or the result ensuing from that which is provided by the written instrument or part of it, would be determined. A determination occurs, for "if there is no property there can be no trust" (see *per* Lord Justice Romer at 3 W.L.R. p. 543).

To satisfy the section it is only necessary that some person "may have power either immediately or in the future" to make the determination and the unlikelihood of that event occurring is immaterial provided that it is possible.

The importance of the reasoning, which was adopted by all three members of the court (see Lord Justice Singleton at 3 W.L.R. pp. 534–535, Lord Justice Morris at 3 W.L.R. p. 539 and Lord Justice Romer at 3 W.L.R. p. 543), is that it would be apparently equally applicable to another widely worded section, namely, Income Tax Act, 1952, s. 399, dealing with the irrevocability of "children's settlements." The narrower reasoning adopted by Singleton L.J. and Morris L.J. as to the exact meaning of "provision," a point left open by Romer L.J., would not assist in construing section 399 (see the note in *Saunders* v. *C. I. R.*, below).

Leave to appeal to the House of Lords was granted.

Saunders v. *C. I. R.* [1956] 3 W.L.R. 547; [1956] 3 All E.R. 83; [1956] T.R. 267 (C.A.)

Income Tax—Power to determine settlement

Statutory provision: Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404 (2)).

Point: The "tax dodge" employed to avoid Finance Act, 1938, s. 38 (2) (now Income Tax Act, 1952, s. 404 (2)), namely, the granting of a power to appoint all the funds under a settlement save £100 absolutely to any of a class of beneficiaries including the settlor's wife, has not only succeeded but the settlement has been described as "carefully and skilfully drawn" (*per* Lord Justice Romer at 3 W.L.R. p. 558). The Court of Appeal unanimously reversed the decision of Wynn-Parry J. (noted in Vol. 19, p. 403) and held that there could be no determination of "the settlement or any provision thereof" by the exercise of this power. Following this reasoning in *C. I. R.* v. *Countess of Kenmare* (noted above) Singleton L.J. and Morris L.J. held that a "provision" of the settlement meant a clause or term or part as opposed to what is provided, but Romer L.J. again refused to come to a final conclusion on the point as he considered it unnecessary so to do. If "provision" means a "clause" the clause is still there after the full exercise of the power, although the funds subject to it are reduced, and thus it is not "determined." If "provision" means the "result" ensuing from the settlement or part of it, the beneficial interest taken, then the full exercise of the power may "quantify" that beneficial interest but again does not determine it so long as there are funds subject to the trust.

The relation between this case and that of the *Countess of Kenmare* is well summarised by a passage from the judgment of Singleton L.J. when he said (at 3 W.L.R. p. 554): "A person who is given power to revoke a settlement or any provision thereof may do so by a document in writing. If he is also given power to determine the settlement, or any provision thereof, one way in which he can do that (assuming the power) is by taking away the whole of the settled fund, or the whole of the settled fund available for the purposes of the particular provision. That would be a determination. The power of the trustees to pay out, or to withdraw, a part—I emphasise 'a part' —of the capital fund is not a determination of the settlement or of any provision thereof: it is something envisaged by the terms of the settlement. The balance remains subject to the trusts of the settlement."

Before drafting settlements on these lines due note should be taken of three points. Firstly, in this case the clause operated even on the remaining £100 after the death of the settlor; secondly, leave to appeal to the House of Lords was granted; and, thirdly, amending legislation would not be difficult to draft.

Milne's Executors v. *C. I. R.* [1956] T.R. 283 (Ch.D.)

Surtax—Sums payable out of capital to widow

Statutory provision: Finance Act, 1927, s. 38 (now Income Tax Act, 1952, ss. 2 (1) and 524 (1)).

Point: This is a further example of the numerous occasions upon which provision of an income nature has been directed by the settlor or testator to be made out of capital subject to the trusts of a settlement or will. Although it would appear likely that even without the clear direction as to the mode of user in this case the payments might well have been held to be income payments, nevertheless such added words acted as the death knell of the taxpayer's hopes. By careful drafting the payments can be stamped with the character of capital or income, almost at will (compare *C. I. R.* v. *Ramsay* (1955) 20 T.C. 79, *per* Lord Justice Romer at p. 98); the danger of making periodical payments out of capital should always be raised with every settlor or testator who desires to supplement his wife's income.

Facts: The testator by his will directed his trustees to stand possessed of his residuary estate (defined as "the trust fund") upon trust for his wife for life. He then provided as follows: "I hereby authorise my trustees to raise and pay to my wife out of the trust fund if they shall be requested by my wife so to do in each year after my death during the life of my wife a sum which shall not exceed the sum of £1,000 *it being my intention* that any sums so raised and paid to her out of the trust fund shall be available to her for the purpose of her maintenance and support in addition to the income to be derived from the trust fund which I have directed shall be paid to her in the foregoing clause." The trustees made successive payments under this clause.

Held, by Vaisey J., that although the trustees had a discretion as to payment the sums were received by the widow as income. The learned judge, although indicating that without the words in italics above and those following the payments would probably still have been taxable income, stated (at [1956] T.R. p. 284): " . . . I am bound to say that I set a good deal of store on, and paid a great deal of attention to, the concluding part of the clause where the testator expressed his intention."

7. *MISCELLANEOUS*

Re Egerton's Will Trusts. Lloyds Bank, Ltd. v. *Egerton* [1956] 3 W.L.R. 453; 100 S.J. 549; [1956] 2 All E.R. 817

Conflict of laws—marriage in community—law governing matrimonial régime.—In view of the number of aliens who have settled here since the war it is surprising that so little is heard of difficulties arising out of marriages in community of property, for the majority of European countries recognise community in one form or another. Once the community attaches it remains, notwithstanding a change in domicile: *De Nicols* v. *Curlier* [1900] A.C. 21; *Re De Nicols* [1900] 2 Ch. 410. Whether a marriage is in community or not depends on the matrimonial domicile, but what does the " matrimonial domicile " mean? Writers on the subject have tried to popularise a theory that this means the intended domicile of the parties, *i.e.*, the husband's, immediately after the marriage, and not necessarily the husband's actual domicile at the time of the marriage. It has been pointed out that this theory is subject to a serious practical objection in that, for whatever reason, the intended domicile may never actually be acquired. The Appellate Division in South Africa in *Est. Frankel* v. *The Master* [1950] 1 S.A.L.R. 220 completely rejected the theory, holding that " matrimonial domicile " means the husband's actual domicile at the time of the marriage.

It is satisfactory that in the instant case Roxburgh J. arrived at precisely the same conclusion. The learned judge, however, expressed the view that this does not entirely conclude the matter, as parties domiciled in a non-community country like England may expressly or impliedly contract that their marriage shall be governed by the community laws of a country in which they intend to acquire a domicile and vice versa. He gives the example of two comparatively poor persons who decide to emigrate to Australia and says, [1956] 3 W.L.R. at p. 460: " I can well believe that the court might think that that was enough in those circumstances to lead to the inference that they intended their proprietary rights (which at that stage were nugatory, but which might thereafter become of great value) to be regulated from the beginning of their married life by the law of Australia."

With respect, does not this very illustration show the dangers of implying a contract as to the matrimonial régime except on the strongest and most compelling evidence? Two persons may well decide to emigrate to Australia, the United States of America, Canada or South Africa, but it is unlikely they will decide in advance precisely which state or province they will reside in permanently, still less intend that their matrimonial rights shall be governed by the laws of one of those particular states or provinces. Is not the truth of the matter that few parties consciously consider how their proprietary rights after marriage will be affected unless their minds are directed to this particular aspect?

THE LIBRARY

Retirement and Other Annuities: Current Law Guide No. 12. By H. G. S. Plunkett, Barrister-at-Law and G. A. Hosking, F.I.A. Sweet and Maxwell Ltd. viii and 111 pp. (9s. 6d.)

The authors are to be congratulated on producing so speedily a short but comprehensive survey of the welcome reliefs granted by the Finance Act, 1956, in the realm of pension provision. Their approach is practical rather than legal but includes an indication of the existing legislation providing tax relief on certain types of pension schemes, so that the newcomer to this field will have no difficulty in understanding the background to the somewhat arbitrary rules as to the amount and nature of benefits obtainable. The relief from tax on the capital element in purchased annuities is also dealt with. Numerous examples are given illustrating the working of the provisions although these are mainly concerned with the anticipated benefits having regard to actuarial considerations. The main principles of law are summarised in terms that should be comprehensible to both layman and lawyer, but it is noted with regret that the authors prefer the uncertainty of administrative discretion to the enforceable statutory right (see the first paragraph of p. 17). This is a book which all who may be called upon to advise the client on his financial affairs should read before the year is out; the layman also may gain from it an intelligent approach to the unravelling of the "blurb" of his insurance company; the student is given a foothold not available anywhere else. In short, a current law guide that lives up to that name.

D. R. S.

Hanson's Death Duties. Tenth edition. By Henry E. Smith, LL.B. (Lond.), Assistant Controller of Death Duties. Sweet & Maxwell Ltd. 1956. lxxvi and 1214 pp. (£6 6s.)

The reappearance of Hanson after ten years is an event of note, the battered state of the ninth edition on every practitioner's shelf testifying not merely age but constant user. As the first and premier book on death duties the unique distinction has now been achieved of the original text being completely expunged, the new edition containing but a short chapter on the obsolete duties, for the last edition by the author was in 1876. It is suggested, however, that pride of place has not been lost.

The format is considerably changed. An introductory narrative covering some 250 or more pages summarises the law practice and procedure relating to estate duty before we find the familiar annotated statutes printed as at March 31, 1956. Even here, however, the editor (or should one say quasi-author?) has eliminated the pattern of paragraphing by relevant extracts from the text of the statute and the comment is in semi-narrative form, numbered paragraphs facilitating cross-references and indexing.

Whilst the immediate and instinctive reaction against change must be admitted and the passing of the extracts as paragraph headings regretted, use of the book for the short time since publication has proved that Hanson, even more than previously, is the one estate duty book in which the index is almost otiose, save for the novice.

The vast number of statutes and judicial decisions during the last ten years, which in many fields, such as the "assets valuation" (Finance Act, 1954, ss. 29 *et seq.*) and policies of insurance (*D'Avigdor-Goldsmid* v. *C.I.R.* [1953] A.C. 347: Finance Act, 1954, s. 33) have revolutionised the law as it stood in 1946, render comment on the need for this edition and the immense labour involved unnecessary. The style of the editor, for that must now be credited to him, is flowing, even the most cryptic of comments being eminently "readable." With all due respect to the editor, the greatest criticism must be the absence now in any of the leading works on this subject of the hand of a practitioner from the paying or defensive side. Whilst the inside knowledge of practice and the "Revenue view" is displayed (not always approvingly but sometimes without any comment) for our benefit, and the striving against bias mentioned in the preface almost successful, the man on the inside tends to appear; thus section 31 (3) (c) of the Finance Act, 1954, brings no legal comment but merely a note of the official attitude; we expect more from *Hanson* on such a novel, obscure and dangerous power. However, this fault is no trap save for the most unwary for the "Revenue view" is clearly declared as such on each occasion.

The examples provided are kept to an adequate minimum and illustrate well and fully the more complex points to which they are annexed, the book not being increased in bulk nor rendered irritating by the inclusion of simple addition for the arithmetically incompetent. The treatment of amended provisions by commentary after the original section rather than by remarks dispersed over the course of pages is admirable although in each case the later section receives its due treatment. Verbosity, as previously, has been ruthlessly eliminated, and the personal views of the editor stated with admirable clarity. One questions, perhaps, the authority the new edition will carry, for the learned opinion accepted over the course of years may not be readily traceable from the old editions to the new, the whole book having been virtually rewritten. Nevertheless, the editor's courage can be forcefully recommended to the editors of many legal books who reduce the comment on the changes and expansion in the law to a series of abbreviated footnotes.

Comment with the sections is the only way in which the finer points and, indeed, the true picture of liability can be seen, and Hanson is the only book that gives it. Those who have used the old edition may add the eagerly awaited new edition to their shelves without fear, for although the change from note to semi-narrative in the commentary will be regretted by many, the content is still invaluable; the newcomer will find it practical in use long before he is conversant with its whole extent.

The print is improved in size and generally "comfortable" to read, considerable areas of white on each page improving the readability and allowing personal annotation. This latter point would be helped by a few clean pages at back and front in last century style. The paper is thin enough to avoid excess bulk but tough enough for constant use. The editor and publishers should consider producing the introductory survey as a separate volume, for it would not appear to add to Part II, when size increases again in the next edition. Their more pressing problem is, however, to keep the book up to date, one Finance Act having already changed some of the law, so that this may be the handbook for the adviser concerned with saving future duty rather than calculating the past liability. Is a loose-leaf supplement prohibitive in cost? Or could a short broadsheet be issued periodically indicating the paragraphs to which new legislation or decisions are relevant, a type of noter-up, disclosing the identity of its compiler or carrying the blessing of the editor? (*a*).

D. R. S.

(*a*) The publishers inform us that Cumulative Supplements will be issued as necessary.—Ed.

The Law of Stamp Duties (Alpe). Twenty-fourth edition. By Peter E. Whitworth, Barrister-at-Law, and James Mackenzie of the Office of the Controller of Stamps. London: Jordan & Sons Ltd. lxiv, 463 and (index) 58 pp. (55s.)

Alpe had become a classic on the subject of Stamp Duties and had run into more than twenty editions before any other of the books on the subject now in the field were thought of. It is therefore somewhat surprising that the present edition should be the first since 1941, although as long ago as 1947 all the more important duties were doubled and in 1949 all the less important duties were abolished. This new edition, now that it has come, is a great improvement on its recent predecessors, and indeed it is hardly recognisable as the offspring of them. As previously it is a commentary on the Stamp Act and relevant Finance Acts, but the resemblance ends there.

Whatever arrangement an author adopts for setting out the relevant statutory provisions he is bound to make some sort of compromise with convenience. So long as we are saddled with a Stamp Act which places the charging provisions in a Schedule and the explanatory sections in the body of the Act, it will be necessary to set out sections of the Act and bits of the Schedule jumbled up together. This by itself makes any commentary on the Stamp Acts rather like a chinese puzzle to the uninitiated. In the present edition the editors have collected together under the various heads of charge all the relevant provisions of the Stamp Act (including the Schedule) and the subsequent Finance Acts, so far as this can be done without printing any section twice over. This arrangement is very convenient for the reader who has at last found his way to the right place, but it makes it very difficult to turn up a particular section of a particular Act without reference to one of the indexes. The book is a gold mine of information, but until you have become familiar with it you need a chart to find your way about it. Fortunately a chart is readily available in the very full index. There is no doubt that if you can find your way to it the gold is there. The editors have a thorough knowledge of the Acts and the case law on them, and they have expounded it clearly.

J. G. M.